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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 603

JOSEPH ARMONE and STEPHEN GRAMMAUTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Joseph Armone and Stephen Grammauta, pray that a writ of certiorari issue to review the judgment (as to each of them) of the United States Court of Appeals for the Second Circuit entered in this case on July 8, 1966 (Appendix A hereto, *infra*).

Opinions Below

The opinion of the Court of Appeals, printed as Appendix B hereto, *infra*, is not yet reported. The District Court did not write any formal opinion.

Jurisdiction

The judgment of the Court of Appeals as to each of the within petitioners was entered on July 8, 1966 (Appendix A hereto, *infra*). A timely petition for rehearing by each of these petitioners was denied by the Court of Appeals on July 28, 1966. The time for filing this joint petition for certiorari has been extended by Mr. Justice Harlan to and including September 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioners are among four defendants who were convicted of narcotics conspiracy. The questions are:

1. As to petitioner Armone—

   (a) Was petitioner denied a fair due process trial by the Trial Court's refusal to grant his motion for severance which was requested on the ground of petitioner's severely toxic physical illness which mentally disabled him from attentiveness to and understanding of important trial testimony and from effectively participating with counsel in the trial?

   (b) Treating the medical and other relevant testimony as having uncontradictedly established petitioner's severe toxic illness and consequent mental disability (which we shall demonstrate was the case here), was it error to rule that petitioner's due process right as a defendant on trial to be effectively "present" during the taking of trial testimony was overborne by the Trial Court's evaluation of the trial testimony thus received during petitioner's physical and mental disability as not having been prejudicial to petitioner? Does due process allow of any such novel policy for curtailment of a defendant's right

to be "present" during the taking of trial testimony merely because the trial Judge deems the particular testimony not prejudicial to the defendant?.

(c) In actual fact, did not the trial testimony taken during petitioner's physical and mental disability include important items which were very prejudicial indeed to petitioner?

2. As to petitioner Armone, has there occurred in this case a fundamental miscarriage of justice in that an innocent man has been unjustly convicted and sentenced to what amounts to probable lifetime imprisonment on the basis of indicatedly fabricated testimony by basely discreditable accomplice witnesses who were not corroborated? Did the circumstances mentioned in Questions 3 to 8, inclusive, *infra*, work such a miscarriage of justice in especially aggrieving ways as affects petitioner Armone?

(The following questions apply to both of the within petitioners.)

3. The sole proof directly inculpative of both of these petitioners on the conspiracy charge having consisted of uncorroborated accomplice testimony by witnesses of inordinately base credibility who moreover were devastatingly impeached, did not the "better practice" rule of, *e.g.*, *Holmgren* v. *United States*, 217 U. S. 509, 523-524, require that the Trial Court in this particular case grant the express defense request for a jury instruction that credence should not be given to the accomplice witnesses without corroborating testimony? In the circumstances of this case, was it not error to decline to obey the aforesaid "better practice" rule? Has there not come about in the lower Federal Courts an erroneous doctrine that corroboration of accomplice testimony is *never* required, based upon an oversimplified reading of this Court's carefully phrased language in *Caminetti* v. *United States*, 242

U. S. 470, 495-496, where the Court noted the *Holmgren* "better practice" rule, noted also its approval of that rule by stating that "* * * this is so, * * *", and then added merely that "* * * there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them"?

4. It being undisputed that a certain alleged conversation about counterfeit money which was submitted to the Jury as supposedly being the subject of overt act No. 10 had not been the subject of any testimony before the Grand Jury and had therefore not been charged in the indictment—i.e., it being undisputed that overt act 10 as submitted to the Jury was a matter of outright mistake in the conduct of the trial—the following questions arise:

(a) Were petitioners denied a due process fair trial in being convicted on a charge not contained in the indictment?

(b) Were petitioners denied a due process fair trial by reason of the confusion which must almost surely have vitiated any rational deliberation by the Jury in connection with the disorganized circumstances at the trial relating to overt act No. 10?

(c) Were petitioners denied a due process fair trial in that it is impossible to be sure that the jurors reached a unanimous verdict, in view of the circumstances in connection with overt act No. 10?

(d) In any event, could the alleged conversation about counterfeit money be an "overt act in furtherance of the conspiracy," since all that had happened in connection with this alleged conversation was that one defendant expressed a general attitude of concern or fear that the counterfeit money incident might lead to an investigation, there being no reference to narcotics in the conversation? And even if this expression of fear of an investigation could rightly be thought

by a trier of fact as referring to a narcotics investigation, does it not transgress all possible bounds of the law of overt acts in conspiracy prosecutions to treat such a merely general expression of fear of detection as amounting to "an overt act in furtherance of the conspiracy" on a theory of "concealment" or on any other theory?

(The following Questions 5 to 8, inclusive, are not argued in this petition but are preserved in the event of the granting of certiorari.)

5. Were petitioners denied a due process fair trial by the reception in evidence of (a) proofs in disregard of the "other crimes" rule, and (b) proofs of "guilt by association"; and by prejudicial instructions to the Jury and prejudicial statements in the prosecutor's summation relating to these items?

6. Were some of the "guilt by association" items additionally prejudicial because they partook also of the improper admission in evidence of items seized from an alleged co-conspirator subsequent to the latters' arrest?

7. Were petitioners denied a due process fair trial and, in the case of petitioner Armone who did not take the stand was there also a denial of the constitutional and statutory privilege to refrain from doing so, by the instructions to the Jury concerning the statutory inference or presumption in 21 U.S.C. § 174?

8. Were petitioners denied a due process fair trial in that the prosecutor's failure to disclose facts pointing to a "deal" with the main prosecution witness Charles Hedges, deprived the defense of an important opportunity to impeach Hedges?

9. Petitioners respectfully adopt the Questions Presented in the companion petitions herein, insofar as applicable to our case and consistent with our contentions.

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment (due process and self incrimination) and the Sixth Amendment (right of counsel and confrontation) of the United States Constitution. It also involves 18 U.S.C. §§ 173 and 174 (narcotics violation and conspiracy) and § 3481 (defendant as witness); these statutes are quoted in the companion petition for certiorari of petitioner Vincent Pacelli, pages 5-7.

Statement of the Case

Petitioners were convicted in the United States District Court for the Southern District of New York (Bonsal, J.) after a jury trial, under a one count indictment for conspiracy to sell and distribute narcotic drugs in violation of 21 U.S.C. §§ 173 and 174(a). Petitioner Armone was sentenced to fifteen years imprisonment and a fine of $20,000. Petitioner Grammauta was sentenced to eight years. On appeal to the United States Court of Appeals for the Second Circuit the convictions were affirmed.

The indictment (24a) alleged, that from about March 1956 to the date of the filing of the indictment (September 30, 1964), in the Southern District of New York, the defendants and co-conspirators conspired to import large amounts of narcotic drugs from France and other countries and to sell, etc., such narcotics. The indictment alleged eleven overt acts, but only the last two of these, overt acts 10 and 11, were submitted for consideration to the trial jury, all of the other alleged overt acts being found by the Trial Court to have been barred by the statute of limitations. Overt act 10 read as follows:

> "10. In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960, in the Southern District of New York, the

defendant JOSEPH ARMONE was in the vicinity of 122 Second Avenue, New York, New York."

The Bill of Particulars gave the following further specifications concerning Overt Act 10:

"10. During March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City."

As will appear, a major issue in this case is presented with respect to the proof of Overt Act 10 and the Trial Court's instructions to the Jury thereon.

The Government's main witness was Charles Hedges, who testified, as an alleged co-conspirator, concerning the conspiracy as a whole. The other Government witnesses included several alleged overseas narcotics couriers. However, the only proof specifically inculpative of petitioner Joseph Armone personally came from Hedges and one James Godwin, a cousin of Hedges and a co-conspirator; the only proof specifically inculpative of petitioner Grammauta came from Hedges. Hedges, supported in some points by Godwin, placed petitioner Armone in the role of a receiver or "importer" of the foreign narcotics. Hedges placed petitioner Grammauta in a similar role.

We do not expect the Government to dispute that without the testimony of the two accomplice witnesses Hedges and Godwin there would have been no case against either of the within petitioners; or that there was no corroboration of those two accomplice witnesses as regards any of their testimony specifically relating to Armone or Grammauta.

Hedges' performance on the witness stand can only be described as grotesque. He displayed incredible insolence towards defense counsel, a sneeringly cynical attitude about his own untruths and altogether a distorted testimonial mentality (e.g., Tr. 425, 428, 430-431, 941-943, 981-982, 1035-1037, 1043, 1078, 1101-1102). It was not surpris-

ing to learn that Hedges had been discharged from the Army on some kind of psychoneurotic or psychopathological ground (Tr. 1042).

Hedges admitted with blitheness and apparently with relish, an astounding series of minutely detailed rank fabrications to which he had sworn under oath in a prior narcotics trial in Connecticut involving many of the same incidents as in this trial (e.g., Tr. 456, 569-575, 578-581, 648-649, 651, 653, 689-694, 708-711, 933-934). With no apparent indication of uncomfortable conscience, Hedges barefacedly contradicted himself, in instance after instance, on such important topics as whether his testimony had been rehearsed with the prosecutor (Tr. 551-552), whether he had been assisted or coached in the development of vital details of his testimony by the Narcotics Bureau investigators (Tr. 763-764, 783-789, 802-803, 833, 909-912, 1180-1206, 1307-1348), and as to whether he had actually (as he said) not minded remaining in jail (after conviction in the Connecticut narcotics trial, *supra*) and in fact liked it or whether instead he had been so desparate to get out of jail that he had even contemplated an escape* (Tr. 696-697, 941-943, 981-982, 989). Apparently emboldened by the Court's seemingly indulgent attitude in the face of his antics on the witness stand, Hedges blurted out that the defendants at one time had wanted him to rob a bookmaker (Tr. 1113-1114), and that the defendants would have come up to Connecticut (presumably to murder him) if he had testified differently in that trial (Tr. 1101-1102)—motions for mistrial on the ground of these statements of Hedges were denied (*ibid.*).

Hedges' attitude when repeatedly confronted with his notorious inaccuracy in the matter of vital dates, was not merely one of acquiesence but it was practically boastful (e.g., Tr. 425, 427, 481, 506-512, 535-536, 549-550, 609-611).

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* Hedges' consuming ardor to get out of jail was indubitably his reason for testifying in this case (*infra*).

Hedges' cross examination on specific items relating to Joseph Armone was especially revealing. Thus, he was unable to give any satisfactory explanation of a discrepancy between his testimony that the first time he gave money to Joseph Armone was around September 1959, and his testimony that in April or May of 1959 Joseph Armone had reproached him for a shortage in a "bundle" of money which Hedges had sent to him (for the development of this portion of the cross examination see Tr. 1041, 1075-1078, 1082-1088, 1244-1247, 1253-1261, 1283-1285). Thus, also, it was shown that Hedges was lyingly attempting to substitute Joseph Armone for Arnold Romano (an absent defendant) in connection with alleged discussions about the amount of payments to be given to Hedges, and at one point, under the pressure of this phase of the cross examination* Hedges suddenly declared that it was Steve Armone** (not Joseph) who was the "head of that crowd" (Tr. 857, 913-914, 1034-1041).

There was a similar collapse of Hedges' testimonial position on the whole alleged phase of Joseph Armone's having put Hedges into contact with the severed defendant Nick Calamaris—in an alleged major new conspiracy phase—around the end of an "inactivity" period in the Winter of 1959-1960, Hedges acknowledging on cross examination that instead of speaking of Nick *Calamaris* in that entire connection he had meant to speak of Nick *Viscardi* (Tr. 1269-1278).

But perhaps the most notable development in the Hedges testimony as regards the specifics of the case against Joseph Armone, came in the cross examination at Tr. 1290-1297 (192a-195a), where Hedges admitted that except for one innocuous reference about a motor trip to Newburgh (which involved nothing wrongful), his detailed handwritten notes which he had prepared in prison for

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* Which moreover dealt with hapenings in October 1958 when Joseph Armone was concededly not even in the picture yet at all.

** Steve Armone, a brother of Joseph, died in 1960.

Narcotics Agent Dugan (Government's Exhibit 25) contained no reference whatever to Joseph Armone, i.e., this handwritten document which Hedges himself swore was as accurate and complete as he could make it in matters of substance (e.g., Tr. 482, 1066-1068), *contained not one word concerning the numerous circumstantial accusations which Hedges made against Joseph Armone in this trial.*

(The handicaps of conventional space limitation in a petition for certiorari are being especially felt by us at this juncture of our presentation where we are treating the testimony of the execrable Charles Hedges. For example, in our brief in the Court of Appeals, despite drastic efforts at conciseness, we found it necessary to devote four full pages (pp. 11-15) to a factual elucidation of just one of Hedges' plainly fabricated items concerning Joseph Armone, namely, Armone's alleged connection with the single most important alleged narcotics importation phase (involving a courier named Clarence Aspelund). At the risk of sounding unseemly importunate, we earnestly state that the normal yearning of a party for the boon of certiorari review by this Court is all the more intense on our part here because we are convinced that if we were given the opportunity, in the more ample space of a brief on the merits, to invite this Court to see for itself the intricate details of Charles Hedges' indicatedly concocted "case" against petitioner Joseph Armone particularly, there would be a very good chance that the Court would find much more than mere rhetoric of counsel in our suggestion in our Question no. 2, *supra,* that Armone especially (but Grammauta as well) has been the victim of an outright miscarriage of justice through the Government's resort to demonstrably false testimony by basely discreditable accomplice witnesses who were not corroborated in their accusations against our two petitioners.*)

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* We are not speaking here merely of jury-type issues as to "credibility" or "sufficiency of the evidence"; we are speak-

(Footnote continued on following page)

We note under our "Reasons", *infra*, certain details concerning Hedges' "deal" with the Government whereby a fifteen-year prison sentence which he was serving was reduced to five years (he obtained his freedom around the time of the end of the within trial).

Co-conspirator James Godwin, Hedges' cousin, testified for the Government (Tr. 1852 *et seq.*; 218a *et seq.*).* Godwin at the time of this trial was serving a sentence of 3½ to 7 years in Greenhaven State Prison for robbery, and a concurrent sentence for burglary (Tr. 1853-1854). Additionally, Godwin had a criminal record that is little short of amazing; he is apparently a classic example of inveterate criminality commencing in early boyhood (Tr. 1855-1856). When asked whether he planned to become involved in more armed robberies once he got out of jail, Godwin answered "How can I tell you * * * how could I tell you the future sitting on the stand" (Tr. 2036).

Godwin testified, *inter alia*, that around March 1960 he gave a one hundred dollar bill to Andy Dillon in Lulu's Bar getting one hundred singles in change (Tr. 1865-1866). About a week later Joseph Armone reproached Godwin and Hedges for Godwin's having given "us" a counterfeit hundred dollar bill, and when Hedges offered to make good the amount, Armone said "It ain't the one hundred dollars, it is the investigation that is going to be involved" (Tr. 1866-1868); the defense moved to strike this testimony and for a mistrial (Tr. 1868).

(Footnote continued from preceding page)

ing of the fundamental issue of policy, in the administration of Federal criminal justice, as to whether it must really be taken as settled beyond possibility of change that *no* Federal criminal prosecution need ever be subjected to the "better practice" rule of corroboration of accomplice testimony.

* The Godwin testimony as excerpted in the Joint Appendix is confusing. We shall therefore cite his testimony from the Transcript.

(Hedges also had testified that around April or May of 1960 there was a conversation which commenced in a restaurant across from Lulu's Bar and which continued in Lulu's Bar, between Hedges and Andy Dillon, joined by Joseph Armone and James Godwin when Dillon and Hedges went over into Lulu's Bar, and in this conversation "Joe Armone told me that the hundred dollar bill that Jimmy [Godwin] had given to them was going to cause a lot of trouble. He said, 'These people have been looking to open up investigations on us for quite awhile. Now is the opportunity' ", whereupon Hedges offered to pay the hundred dollars—which was a counterfeit—and Joseph Armone said "It is not the hundred dollars. It is the trouble that the hundred dollar bill can cause" (164a-165a); the defense strenuously objected to the reception of this evidence and moved for a mistrial on the ground that it was evidence of another and unrelated crime (*ibid.*).)

When cross examined concerning the incident of the one hundred dollar counterfeit bill, Godwin said that Andy Dillon at Lulu's Bar was taking horse bets on the telephone at the time when Godwin exchanged the hundred dollar bill for singles (Tr. 2058-2059).* Godwin also said that he had obtained the hundred dollar bill from a friend of his named Mickey, who had owed Godwin $60 and had given him the hundred dollar bill asking for $40 in change (Tr. 2064).** Especially interesting was Godwin's testimony on cross examination at Tr. 2071, when he said with some petulance that the entire episode of the one hundred dollar bill was "making a big issue out of nothing"; in other words Godwin who supposedly would be in a position

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* It thus appears that Joseph Armone's alleged remarks about fearing an investigation in connection with the counterfeit bill would most logically have related—if such happened at all—to a fear of a bookmaking investigation, not narcotics.

** Here, then, is positive evidence, from the Government's own witness, that the one hundred dollar counterfeit bill could not possibly have had any relation to any alleged narcotics aspects.

to understand the larger sinister significance of this episode (if there were such), considered the entire incident of no importance.

Godwin admitted that he had told someone in Greenhaven Prison, or while he was out of jail, that one of the defendants in this case was innocent (Tr. 2048).

Godwin had sought out the Federal Narcotics Bureau while he was in prison, evidently with a view to purchasing favor for himself by offering information concerning narcotics transactions (Tr. 1903-1904). Thereafter Godwin got a much lighter sentence in a certain State proceeding than he had expected (Tr. 1904-1907). See also Tr. 1927, where remarks of the State sentencing Judge are quoted, in which reference is made to Godwin's offer to cooperate with the Federal Narcotics Bureau.

Petitioner Grammauta took the stand in this trial to testify in his own behalf, denying the charges in the indictment (Tr. 3439 *et seq.*).

The facts as to petitioner Armone's illness during the trial (Question no. 1, *supra*), as to the mistaken instructions concerning overt act No. 10 and the counterfeit money incident (Question presented no. 4, *supra*), and as to other topics alluded to in our Questions Presented but not touched upon in this Statement of the Case, will be taken up in appropriate connections *infra* under our "Reasons", which next follow.

Reasons for Granting the Writ

I

As to petitioner Joseph Armone this case presents an unusually compelling issue of due process and of the fair administration of Federal criminal justice. It was grievous error, involving a judicial insensitivity to due process

which is surprising in the present day, to deny Armone's motions for a severance which was requested on the ground of his grave illness during the trial, his consequent inability to maintain an effective attentiveness to the trial proceedings, and his inability to confer or to cooperate effectively with his counsel.

Joseph Armone, some months prior to this trial, had suffered an abdominal gunshot wound from which he had narrowly escaped with his life only after massive emergency surgery; and at the time of this trial he was still suffering from a pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition (361a-368a). During the course of the trial the Court saw fit to remand all of the defendants for the duration of the trial, whereupon Mr. Lewis, counsel for Joseph Armone, apprised the Court of his client's medical problem and that he would be needing periodic treatment from his regular physician, Dr. Louis Rosati, who was a noted surgeon and who had performed the surgery that had saved Armone's life. The Court, we readily state, took a cooperative attitude concerning this. On May 21, 1965, during the trial, Joseph Armone's counsel advised the Court that his client would need to see his doctor on that day (232a); and on May 28, 1965, counsel again advised the Court that Armone needed treatment and that he was in pain (284a).

On Tuesday, June 8, 1965 Mr. Lewis advised the Court that Joseph Armone was seriously ill, he had been vomiting all night at the West Street Prison (329a-334a). A little later that day the situation became evident to everyone, and Joseph Armone had to be taken by ambulance in a state of collapse to a hospital, the Columbus Hospital, where the Government had him examined by Dr. Henry Jaffee (who did not testify herein); from Columbus Hos-

pital Armone was moved to the prison ward at Bellevue Hospital (334a-339a).

On the following day, Wednesday, June 9, 1965, Mr. Lewis moved for a severance for Joseph Armone (339a-340a); meanwhile Armone had been forced to come back to Court that afternoon, although we think we may fairly say it was perfectly manifest that he was suffering very much (339a-341a). *He had received no medical assistance at Bellevue Hospital except for being put on a fat-free diet* (408a-409a). On that resumed trial day (Wednesday, June 9) Joseph Armone was compelled to suffer through the trial proceedings while important testimony for the defense was received in contradiction of essential parts of Hedges' testimony (Zimbler, Tr. 3266-3270; Landi, Tr. 3270-3290; Greenberg, Tr. 3926-3300; Zimbler resumed, Tr. 3300-3301), and while important testimony was taken also from Narcotics Agent Dugan concerning his dealings with Hedges during Hedges' "cooperation" while confined in a Federal prison (Tr. 3302 *et seq.*). Near the end of that court day (Wednesday June 9), Mr. Jacobs, the Prosecutor, informed the Court that the Bellevue physician had said Joseph Armone could be in Court the next day (342a). Mr. Lewis told the Judge "This man is sick right now, * * * I don't think there is one out of a hundred defendants who would sit in the courtroom like this man is doing" (342a), to which the Court calmly replied "Let us proceed today. He is here and we will finish up" (342a).*

When the trial commenced on Thursday morning, June 10, it turned out that Mr. Jacobs' prediction of the pre-

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* Armone's counsel, Mr. Lewis, had been unavailingly urging upon Judge Bonsal, the Trial Judge, that Armone's "health and his right to be aware of everything that is taking place and his right to confer with his counsel are paramount to any onerousness that may be placed upon any of the jurors who may have something else to do" (340a). We are obliged to mention that a lady juror wanted to go on a vacation cruise, and that this was repeatedly urged by the Court upon counsel, as necessitating expedition of the trial (Tr. 3137; 331a, 339a, 347a, 348a, 351a).

vious afternoon was wrong, and that the Bellevue physicians had refused to let Joseph Armone be brought to Court that morning (343a). Indeed, it turned out that Armone's condition was so serious—to an extent which was now obvious to everyone—that the trial was adjourned for that Thursday, and for the following day, and was not resumed, then, until Monday morning, June 14 (343a-352a).

When the trial resumed Monday June 14, Armone having been brought to Court, Mr. Lewis advised the Judge that Armone was "physically and mentally unable to continue with the trial at the present time. He tells me that he was vomiting all morning and they gave him injections to try to stop the vomiting"; Mr. Lewis, also protested that the Bellevue doctor who was apparently handling Armone's case was merely an interne (352a). The zealous prosecutor delivered himself of an argument, the gist of which may fairly be characterized as being that any doubts should be resolved against Joseph Armone's health and in favor of the Government's desire to have him continue present at the trial (353a-355a).* The Trial Court noted counsel's objection and stated that he would like to have a hearing and the testimony of the various doctors as to Armone's condition (355a). Mr. Lewis again objected to proceeding with the trial at that time, moved again for a severance, and moreover he advised the Court that he was obliged to absent himself for awhile that morning (Monday, June 14) on another matter in the Federal Courthouse (Tr. 3359). Joseph Armone gallantly consented to let Mr. Lewis be excused for the latter purpose and to have another of the defense attorneys, Mr. Krieger, cover for him (Tr. 3359-3360). The Court directed that the trial continue, and over the next hours there was received in evidence the extremely important defense testimony from

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* Cf. our last footnote, *supra*, concerning the vacation-cruise plans of the lady juror.

the witness Nicholas Calamaris, who had been subpoenaed for the purpose from a Federal prison, and whom the prosecutor relentlessly cross-examined (Tr. 3362 *et seq*). The witnesses who followed Calamaris on that day were the defense witness Philip Gray, who testified on an important issue of contradiction of Hedges (Tr. 3432 *et seq.*), the co-defendant Grammauta testifying in his own behalf (Tr. 3449 *et seq.*), and the co-defendant Alfred Armone testifying in his own behalf (Tr. 3479 *et seq.*).

When Court resumed on Tuesday morning June 15, Mr. Lewis advised the Court that Joseph Armone "tells me he feels very ill today" (358a), to which the Court responded, "All right, that has been noted" (358a). There followed testimony by a defense witness (Kimball) called to elucidate the narcotics courier Bourbonnais' motivation for testifying (Tr. 3533 *et seq.*), the testimony of the co-defendant Viscardi in his own behalf (Tr. 3567 *et seq.*), the testimony of John Federico called by Joseph Armone to testify concerning his employment and earnings (Tr. 3572 *et seq.*), the extremely important testimony of Sol Gold called by Mr. Lewis to refute James Godwin's testimony that he had not said that the defendants were innocent (Tr. 3580 *et seq.*), the testimony of Joseph Armone's wife concerning his acquaintance *vel non* with various of the defendants and co-conspirators (Tr. 3610 *et seq.*), the testimony of a Government witness (Deirdre Quinn) called to refute testimony of Viscardi (Tr. 3620 *et seq.*), similar testimony by Government witness Durham, a narcotics agent (Tr. 3632 *et seq.*), and vitally important resumed testimony by James Godwin called to refute Sol Gold (Tr. 3636 *et seq.*).

Also on Tuesday June 15 the Court heard medical testimony and testimony from Joseph Armone himself concerning his condition; for the entirety of this testimony, see 361a-368a, 378a-429a, 545a; Tr. 3920-3936; Tr. 4293-4358a—the item last cited being testimony by a physician for the Government (Dr. Kostecki) which was received

after the jury verdict, for reasons best known to the Honorable Trial Judge but which escape our understanding.*

Dr. Arthur H. Aufses of Bellevue Hospital, called by the Government, testified that he had examined Armone at Bellevue on Thursday, June 10 at the instance of the Government (378a). He examined Armone for fifteen minutes. Armone had a relatively rapid pulse, appeared to be in pain, in the region of the fistula opening in the abdomen there was a mass which was moderately tender (379a). He could not venture an opinion whether on Monday, June 14, Armone could understand the testimony of that day (383a, 384a). When he saw Armone on Thursday, June 10, Armone was toxic (386a, 387a). On direct examination the prosecutor asked Dr. Aufses whether Armone was disoriented at the hospital on the latter day, the answer being "not as far as I could determine" (379a); he found Armone responsive to his questions (380a). Not content with having extracted from Dr. Aufses these obviously guarder (if not grudging) answers supposedly favorable to the Government**, the prosecutor over-pressed Dr. Aufses and then received an even more guarded and qualified answer (380a):

"Q. Did you find that in your opinion, from your [3731] speaking to him that he understood what you

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* Indeed, without awaiting Dr. Kostecki's post-verdict testimony, the Trial Judge rendered an oral opinion denying the motion for severance (429a-433a—details *infra*); and the Court of Appeals considered the record as it was before the Trial Judge when he denied the motion (slip opinion p. 2564, fn. 17, Appendix B hereto, *infra*), i.e., the Court of Appeals did not take Dr. Kostecki's testimony into consideration. In fact, Dr. Kostecki, had practically no knowledge about the case, was proceeding largely if not entirely on the basis of advice from another Bellevue physician, Dr. Donohue (*infra*), and was merely exercising a formal supervisory authority (Tr. 4297 et seq.; and see especially 429a).

** It must be remembered that this portion of Dr. Aufses' testimony relates to Thursday June 10 at Bellevue Hospital, not to any of the three court days with which we are here concerned (Wednesday June 9, Monday June 14 and Tuesday June 15).

were saying? A. He did. I thought he did. However, he was sick at the time. I felt that he was in pain, that there was a question from his general appearance that he was toxic at the time."

Dr. Aufses was giving the testimony here being described during the late afternoon of *Tuesday June 15*, at which time he found Armone "much improved physically over what he was when I examined him on Thursday afternoon [June 10]" (381a), and Armone had answered the few questions Dr. Aufses had just asked him on that late Tuesday afternoon (June 15) "perfectly logically and rationally" (381a). However, when asked about the intervening days, Dr. Aufses was unable to contribute anything other than that Armone had drained considerable pus on Friday June 11 which would make him begin to feel better "but it might take him a few more days to get back to his normal self" (382a); and while stating that at the time he was then testifying (late Tuesday afternoon June 15) he thought armone would be able to understand trial testimony and confer with his attorney, Dr. Aufses flatly declined to "venture an opinion as to yesterday [Monday June 14]" (383a-384a). On cross examination it was brought out that Dr. Aufses had told Armone's own physician, Dr. Rosati (*infra*), that he (Dr. Aufses) did not think Armone could go to court on Thursday June 10 and Friday June 11 and that he would not assume responsibility if Armone went to court; and when asked whether he had also told Dr. Rosati that if all tests at the hospital should prove negative Armone could go to court for no more than two hours a day, Dr. Aufses agreed that he "may have" so told Dr. Rosati (384a). These latter tests included X-rays, and Dr. Aufses pronounced the X-rays which were taken as being "Very inadequate" (384a, 385a). When asked whether a toxic condition affects a person's mental alertness, Dr. Aufses replied that "It may or it may not", and he repeated that he had no knowledge of whether

Armone had been able to follow the court proceedings on Monday June 14; *indeed he added that he also did not know whether on Tuesday June 15, up until the time he examined Armone which was late on that afternoon, Armone had been able to follow the court proceedings* (386a).

Dr. Robert E. Donohue, the Bellevue Hospital interne who had the principal medical contact with Armone at that hospital during the period in question, was called as a witness by the Government (Tr. 3920-3962).* Dr. Donohue had first seen Armone at the hospital Wednesday morning June 9 (Tr. 3921). Armone at that time "appeared to be in some distress and he was complaining of nausea and had been belching and had given a history of vomiting at that time" (Tr. 3922-3923). As regards Armone's having been released from the Bellevue prison ward to go to court that afternoon (still Wednesday June 9), Dr. Donohue stated that the decision to release Armone on that occasion was made by Dr. Kostecki, the senior resident in charge; Dr. Donohue was present at the time and Dr. Kostecki consulted with him before making the decision (Tr. 3922, 3926-3927).** Dr. Donohue further said there had been no change in Armone's condition from earlier that morning until just before he went to court; there was still nausea and belching (Tr. 3922). When asked whether Armone understood him in conversation just before going to court on Wednesday June 9, Dr. Donohue answered "I think he did, yes" (Tr. 3922-3923). Dr. Donohue again saw Armone

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* The Joint Appendix unfortunately omits the most important portions of Dr. Donohue's direct examination (Tr. 3920-3936; 400a-403a); we shall therefore refer to the Transcript pages for this direct examination.

** As will appear, Dr. Donohue's participation in the above mentioned consultation with Dr. Kostecki could scarcely have been in favor of releasing Armone from the hospital, but the Government evidently chose not to explore this important point in its direct examination of Dr. Donohue.

Wednesday evening after his return from court, and Armone's condition had remained unchanged; when Dr. Donohue spoke to Armone at that time Armone understood what he said; this conversation was "just about a minute or so" (Tr. 3924).

Especially interesting was Dr. Donohue's testimony as to Armone's condition on the following Monday (June 14), Dr. Donohue stating that *"I would think on the following Monday he was in worse physical condition than he had been on Wednesday"*; and even more interesting, when asked to compare Armone's condition on Monday June 14 with that on the preceding Thursday—which, it will be recalled, was the day when the Bellevue authorities absolutely forbade the release of Armone to go to court—Dr. Donohue answered *"I think the condition was the same on Thursday of last week as it was on Monday of this week"* (Tr. 3929). The decision to send Armone to court on Monday June 14 was made, again, by Dr. Kostecki (after consultation with Dr. Donohue); when asked whether Armone was *examined* by Dr. Kostecki before thus being sent to court on Monday, Dr. Donohue's evidently ironic answer was, "he was *seen* by Dr. Kostecki" (Tr. 3927-3928) (emphasis supplied).* Before coming to court Monday morning June 14 Armone "was complaining of nausea, some dizziness, and he said he had vomited • • • there was vomitus at the bedpan at the bedside" (Tr. 3928). Thereupon Dr. Donohue gave Armone an injection of ten milligrams of Compazine, an anti-emetic from which "dizziness can be a side effect" (Tr. 3929-3930).

Apparently shaken by the foregoing direct testimony of his own witness Dr. Donohue, the prosecutor tried

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* It will be recalled that Dr. Kostecki did not testify in this matter until after the jury verdict, by which time Judge Bonsal had of course already rendered his negative decision on the motion for a severence; and that the Court of Appeals declined to take Dr. Kostecki's testimony into consideration.

another tack. He asked Dr. Donohue whether Armone was in a toxic condition on Monday June 14, to which the witness replied unequivocally, "Yes, he was" (Tr. 3930). Desparingly the prosecutor then asked his doughty medical witness, "and yet he was released to come to court?", to which Dr. Donohue's terse reply was "Yes" (Tr. 3930-3931). The prosecutor then asked Dr. Donohue to explain what he meant by "a toxic condition", and the answer was, "Mr. Armone's condition was that of severe belching, nausea, and vomiting, and on both Thursday and Friday of last week and on Monday morning of this week he had these particular signs and symptoms" (Tr. 3931).

The prosecutor then took still another tack with Dr. Donohue, asking the witness for his opinion as to Armone's state of mental awareness before and after being in court on Wednesday June 9, the answer being "I don't think there was any change really in the condition" (Tr. 3931). The Court then interposed with a request for Dr. Donohue's opinion as to whether Armone knew what was going on in court Wednesday afternoon June 9, to which the answer was, "Well when I had spoken to Mr. Armone before leaving and upon his return he appeared at both times aware of his surroundings, et cetera, and that is as far as I would be able to go as to state what his condition was in the courtroom" (Tr. 3931-3932). The Court then asked Dr. Donohue's opinion as to whether Armone understood what was going on in the courtroom on Monday June 14, to which the Doctor replied (with commendable scientific objectivity in refusing to be drawn into an answer that would be unfair to Armone), that "Before he left for court in the morning he was complaining of nausea, dizziness and vomiting, as I stated, and when he came back he did appear to be in better physical condition and he was not complaining of symptomatology" (Tr. 3932-3932a).

Dr. Donohue further testified that Tuesday morning June 15 Armone "looked markedly improved" (Tr. 3933).

Dr. Donohue was next asked by the prosecutor about the tests done on Armone at the hospital (including a GI series), and whether the results of the tests indicated whether Armone would be fit to come to court or not, Dr. Donohue's answer being, "No, it had no determining qualities whatsoever" (Tr. 3935; and see Tr. 3933-3936).

Even more revealing was the defense cross examination of Dr. Donohue.* It emerged that the Government had taken a rather strong hand with the Bellevue hospital authorities during the period when Armone's illness was so undisputably grave that the hospital would not let him go to court (Thursday and Friday June 10-11). Dr. Donohue had told Armone's attorney, Mr. Lewis, about 3 o'clock Friday afternoon June 11 that X-rays of Armone were to be taken on the following Monday morning, but after Dr. Donohue spoke with the prosecutor (Mr. Jacobs) it was decided to take the X-rays that same afternoon (405a). Dr. Donohue next went on to testify as follows (405a):

> "Q. Didn't Mr. Jacobs tell you that he wanted Mr. Armone in court Monday morning? A. He suggested if he could possibly have him in court, his physical condition notwithstanding, yes."

Dr. Donohue further testified that a toxic condition "possibly could" make a person drowsy and cause headaches, and that he could not and did not know whether Armone was drowsy or able to follow the proceedings as alertly as the average person who was not ill on the days Armone was in court (406a-407a); and that he had not inquired of Armone how he felt while he was in

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* Here we may refer to the Joint Appendix, which contains the entire cross examination.

court (407a). Dr. Donohue also replied "I couldn't state", when asked whether he could state with a reasonable degree of certainty that Armone could understand the court proceeding on Wednesday June 9 (407a). Dr. Donohue further testified that although Armone had been brought to the hospital on Tuesday June 8 in an ambulance, he had been given no medical treatment on that day and, as earlier noted, he was given no medication Wednesday morning before he went to court even though at that time he was toxic, had vomited, complained of pain and "was in a sick condition" (408a-409a). Dr. Donohue was then asked (409a-410a):

> "Q. I will ask you, sir, now as a doctor, if this was your patient would you permit him to go to court and sit in the courtroom in the condition he was? A. Probably not."

On re-direct examination, the prosecutor in an attempt to rehabilitate this witness because of the aforesaid answer, asked him:

> "Q. You testified that last Wednesday if Mr. Armone was your patient you wouldn't have permitted him to go to court, is that right? A. Yes.
>
> Q. Could you explain that? A. On the basis of severe belching, vomiting, I don't think that the—
>
> Q. That is—
>
> Mr. Lewis: Let him finish
>
> A. On the basis of the symptoms I would not have permitted him to go." (416a)

Dr. Donohue also testified further (on cross examination) as to the happenings of Monday morning June 14. He was asked, "Did Mr. Jacobs say to you that it is important that Mr. Armone be in Court this morning so that the trial "won't be delayed", and Dr. Donohue answered "Yes" (410a). Dr. Donohue told Mr. Jacobs that Mon-

day morning that Armone had complained of dizziness and had been vomiting and nauseous, whereupon Mr. Jacobs had asked him whether there was something he could give Armone "to allay those symptoms because we want him in Court" (412a). Mr. Jacobs had "suggested that if at all possible he would like Mr. Armone to be in Court on Monday morning" (413a).

On re-direct examination the prosecutor asked Dr. Donohue whether they had spoken together on Wednesday June 9 to which the doctor replied that he believed so, "I don't know"; and when the prosecutor asked "Did you tell me Mr. Armone was fit to come to Court Wednesday afternoon", Dr. Donohue said "Yes, sir" (416a)—even though, as previously seen, Dr. Donohue had testified on direct examination that if Armone had been his private patient he would not have let him go to Court on Wednesday; indeed, on re-cross examination (almost immediately after the "re-direct" item just noted), Dr. Donohue stated that he may have told Mr. Jacobs on Wednesday morning (June 9) that in his opinion Armone should not go to Court (417a-418a). The prosecutor also elicited on re-direct examination that on Monday, June 14, Dr. Donohue had stated it "was a possibility" that Armone was malingering. However, Dr. Donohue went on to clarify this as meaning that he had been speaking on the basis of observation of other patients in the past; he had never told Mr. Jacobs that Armone was malingering (416a-417a). This last makes it pertinent to mention that at the conclusion of the trial Judge Bonsal spontaneously declared to Armone "* * * you have been ill during the trial and not malingering" (545a).

Dr. Louis M. Rosati was called as a defense witness. He is Professor of Clinical Surgery at the New York University School of Medicine, director of surgery at the Columbus Hospital, and attending surgeon at Lenox Hill Hospital (361a). On January 3, 1964 at Columbus Hospital he operated on Armone, who had been shot through

the left lower chest. He had a perforation of the left diaphragm, perforations of both aspects of the stomach, a laceration of the head of the pancreas, a severance of one of the main arteries and a penetration of the right colon. He was confined to the hospital for three months. He was left with a chronic pancreatic abscess. The chronic pancreatic tract backs off or dams back occasionally, causing sepsis. When it backs up, Armone develops an undrained abscess which raises his temperature, makes him very toxic and requires drainage and supportive therapy (361a-363a). Dr. Rosati had spoken with Dr. Aufses of Bellevue who said that Armone was toxic, appeared to be disoriented,* sick with belching and occasional vomiting (363a). Dr. Rosati defined "disoriented" as being "not with it" (365a). Dr. Rosati also testified that Dr. Aufses told him he would not assume responsibility for Armone's coming to Court (368a). The Trial Court refused to permit Dr. Rosati to answer the hypothetical question whether a man who is "not with it" could sit in a courtroom for six hours and understand everything that took place in the courtroom (365a). This question was proper because it called for an expert opinion as to Armone's mental competence.

Armone testified as to his physical and mental condition. On Wednesday, June 9, he was vomiting, had pain in the open tract and severe headaches (389a). "A lot" of the testimony presented on Wednesday afternoon (June 9) "passed me right by" (389a), and as to the testimony on Monday (June 14) he was not able to follow "all of it" (391a). He was vomiting Monday (390a), and was in pain when he came to Court (391a). He was asked whether, when he has nausea and vomiting, he tends to get drowsy, and he answered "Yes, sir. I get a passing out feeling" (392a). On the morning of Tuesday June 15 he had nausea and pain (391a). He was asked whether on Monday and

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*Dr. Aufses had denied telling Dr. Rosati that Armone was disoriented (379a).

Tuesday June 14-15 he had the "passing out feeling" and he answered "I had it on and off"; he was asked whether this prevents him from following the proceedings in Court, and he answered "Yes, sir" (392a).

The prosecutor cross examined Armone as to what testimony he had missed. Armone said "I don't remember what I missed", and that he did not remember who the witnesses were (424a). He did not recall at all the witness Zimbler (425a). He uncertainly recalled a part of the testimony of the witness Landi (425a). He recalled the witness Greenberg, who testified about a co-defendant's employment and earnings (425a). As to the testimony of narcotics agent Dugan, Armone remembered Dugan's taking the stand but "a lot of his questions and answers went by me" (425a). In fact, Armone had begun having trouble in following the testimony when he started to get his nauseous feelings about two weeks previously (426a-427a). He remembered co-defendant Viscardi on the stand but had missed part of the testimony (427a). As the prosecutor pressed him to tell whether he had informed his counsel of this difficulty in following the testimony, Armone stated "I don't think I did. I don't know. I would not recall, Mr. Jacobs. There is a lot of stuff that went on you could ask me for a million years, I would not know what went on here. I don't think I have even been on trial. * * * It is because I don't feel good" (427a; and see 425a-428a).

At the conclusion of the above testimony of Armone, which had followed that of Drs. Aufses, Donohue and Rosati, the prosecutor informed Judge Bonsal that when the matter of further medical testimony had been explained to Dr. Kostecki, the latter had stated, "Well, under those circumstances Dr. Donohue is the man who took care of this man" (429a). The Court expressed uncertainty as to whether it felt prepared to decide the motion for severance without hearing from Dr. Kostecki, and it deferred decision with the remark "I was not particularly satisfied with the testimony today" (429a).

The colloquy just described was had on Thursday, June 17, when the last of the testimony pertaining to Armone's illness was taken (Tr. 3762, 3976-3977). On the following day Judge Bonsal rendered an oral decision denying the motion for severance (Tr. 3978; 429a-433a), without having waited for the testimony by Dr. Kostecki; this oral opinion was rendered prior to the Court's charge to the jury on June 21 (437a *et seq.*). The Court noted that Dr. Donohue had thought Armone toxic on Wednesday, June 9 and also on Monday, June 14; and that "the doctors indicate" the same; "They all agree that the effects of this toxic condition may be vomiting and I think there was evidence that Mr. Armone did vomit. That he may have had headaches, he may be dizzy" (429a-431a). The Court also stated that "there seems to be no question at all that on Tuesday [June 15] Mr. Armone's condition was satisfactory" (431a)—a conclusion which is puzzling in view of the testimony, *supra*. The Court also noted that Armone himself had testified that on Wednesday, June 9 and Monday, June 4 "things passed him by" (431a); and the Court evidently thought it important to emphasize that Armone "did not raise the question at the time" (*ibid.*).* The foregoing were the Court's only findings or comments on the relevant medical aspects of the situation, and the Court then went on to announce what was evidently its *ratio decidendi* for denying the motion for severance, namely, that the testimony received during Armone's illness was from witnesses called by various defendants—the inference being (we take it) that any inability on Armone's part to follow or to understand such testimony did not result in any prejudice (432a). The Court concluded that "Under all these circumstances I do not see that any prejudice has resulted" (432a).

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* As seen, Armone himself testified quite convincingly and indeed movingly, we think we may say that his failure to make an explicit issue of his mental disability at the time was but one further indication of his disabled and demoralized condition.

It is thus clear that the denial of the motion for severance was made in the face of the following: (1) The Trial Court found that all the doctors agreed that Armone was toxic on Wednesday, June 9 and Monday, June 14. (2) No doctor testified that Armone was able to follow the proceedings on those days, or on Tuesday, June 15. (3) Armone's testimony that he was mentally disabled at times during all three of those days is uncontradicted, and it is consistent with literally *all* of the medical testimony. (4) The Government was undeniably guilty of putting pressure on the Bellevue Hospital medical authorities to expedite Armone's return to Court in at least partial disregard of considerations of medical propriety if not sheer normal humaneness. (5) The physician who was in the best position to judge the situation, Dr. Donohue, the Government's own witness, was the witness who gave the strongest and the most emphatic testimony pointing to condemnation of the Government's pressures to have Armone brought to Court while he was ill. (6) Judge Bonsal made no finding that Armone was mentally competent during the times in question, but decided the matter, it seems, on the basis of the supposedly non-prejudicial nature of the testimony taken during Armone's illness. (7) The genuineness of Armone's illness, and its severity, are beyond question, Judge Bonsal himself having stated to Armone at the conclusion of the trial, as seen, "* * * You have been ill during the trial and not malingering" (545a). (8) An important factor in "rushing" this trial was the desire of a lady juror to go on a scheduled vacation cruise.

In the light of the above, the reasoning of the Court of Appeals in sustaining the denial of the motion for severance deserves special scrutiny for that reasoning is most strange (slip opinion, pp. 2563-2564, Appendix B hereto, *infra*). The Court of Appeals resolved the medical issue under the test of the Trial Court's exercise of discretion, *viz.*, on the basis that "at most there was a conflict of testimony" as to Armone's competence to stand trial and

that "despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence." We must respectfully state that these words of the Court of Appeals are incomprehensible in the face of the record. In our recitals of the medical testimony, *supra*, we have aimed at the fullest and fairest description, and we are sure that our description is proper. Where, in that testimony, is there one shred of support for the Court of Appeals' statements that "there was sufficient medical testimony to establish Armone's competence", or even for its statement that "there was a conflict of testimony"? No physician testified that Armone was competent; therefore, not only was there not "sufficient medical testimony" to that effect, but there was *no testimony* to that effect, so that there is not even "a conflict of testimony," either as between any of the physicians, or as between any physician and Armone himself on the issue.

Furthermore, since the Court of Appeals' decision is based, as just seen, solely upon its approval of a supposed exercise of discretion by the Trial Court on the medical proofs, it becomes of decisive importance (we respectfully believe) to point out once again that the Trial Court denied the motion for severance not on the question of medical competency but on the theory that the testimony received on Wednesday, June 9, and Monday, June 14 was not prejudicial. *The Court of Appeals did not take this into consideration at all,* or even mention it.

In any event, this conclusion by the Trial Court that Armone was not prejudiced by the testimony received during his illness is simply wrong as a matter of fact. The Armone defense had introduced testimony by Carlos Costantino, the owner of Lulu's Bar, to the effect that Joseph Armone had not been a visitor or habitue of the bar during the times as to which Hedges and Godwin testified having had various dealings there with Armone (Tr. 3219-3233).

Co-defendant Pacelli, on Monday, June 14 (when Armone was gravely ill) called Nicholas Calamaris as a witness; under vigorous prosecution by the prosecutor, Calamaris testified that he saw Armone at Lulu's Bar during 1959 and 1960 (Tr. 3362 *et seq.*). This testimony was extremely prejudicial to Armone for it impeached the testimony of Costantino. The prosecutor evidently considered this testimony of Calamaris to be of prime value for the Government, for on two occasions in his summation he engaged in emphatic oratory concerning it (Tr. 4084, 4101).

We have not been able to find any reported case which holds that the right of a defendant to be present at all stages of his trial, to comprehend the proceedings, and to confer with counsel, applies only when unfavorable testimony is being adduced. Every elementary consideration of the basic constitutional law of this subject of a defendant's right to be present at his own trial and to confront the witnesses, cries out against this novel theory of the Trial Court in the instant case. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Annotation*, 144 A.L.R. 199. Cf. *Shields* v. *United States*, 273 U. S. 583. If the situation is to be viewed as one in which the Trial Judge did here find the defendant mentally competent—i.e., if the case is to be viewed as one where the issue of mental competence was discretionarily resolved by the Trial Court against the defendant, rather than as a case where no adverse finding on that issue was (or could have been) made against the defendant and the motion for servance was denied on the dispositive basis that no prejudicial testimony was received during the defendant's illness—then the situation presented to the Trial Court in regard to the indubitable, grave and disabling illness of Joseph Armone was classically illustrative of the type of situation envisaged in *Dusky* v. *United States*, 362 U. S. 402, where, adopting the Solicitor General's phraseology, the Court stated that to support a finding of mental competency "the District Judge 'did need

more information than this record presents'. * * * it is not enough for the District Judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of facts' ". The Court went on to say that the " 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him' ". Accord: *United States* v. *Valentino,* 283 F. 2d 634, 635 (C.A. 2, 1960); *Pouncey* v. *United States,* 349 F. 2d 699 (C.A.D.C., 1965). And see *United States* v. *Kelly,* 349 F. 2d 720, 758-759 (C.A. 2, 1965).

We respectfully add that in the particular situation here presented there obtrudes, moreover, a due process question which may well transcend the importance of the question as to the conventional Fifth and Sixth Amendment wrongfulness of compelling Joseph Armone to sit through those portions of the trial during which his severe physical illness was impairing his abilities of mental attentiveness. The larger due process issue here is, whether the factor of the surprising inhumaneness on the part of the Government and the Trial Court in their respective overall courses of conduct regarding this undeniably very sick and suffering defendant, is a factor which (either independently or in conjunction with the abuse of judicial discretion in denying the motion for severance on the objective medical picture) demands due process condemnation as a matter of simple fairness and humane decency in the administration of Federal criminal justice. This larger due process issue is in this case because the case involves prosecutive and judicial "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.' " *Rochin* v. *California,* 342 U. S. 165, 172, 173.

II

This petition for certiorari brings before the Court, we realize, another in the tedious and seemingly endless series of Federal narcotics conspiracy convictions. The pattern here is classic—conviction on the testimony of accomplice witnesses who are persons of the vilest character. But in important respects our case departs from the tedious and dismal norm. We say this not only because "our" accomplice witnesses are even viler than the "normal" creatures of their species in prosecutions of this type, but for other reasons which are much more to the point as regards the fair administration of Federal criminal justice. One of our petitioners—Joseph Armone—has not even been convincingly inculpated by the accomplice witnesses (Hedges and Godwin); our other petitioner—Stephen Grammauta—is entitled at the very least to ask that the testimony of the sole witness against him (the accomplice Hedges) be weighted in scales of a more traditional calibre of justice than that which seems to have become the fashion in the lower Federal courts under the supposed "rule" that accomplice testimony need *never* be corroborated.

This supposed "rule", as we are about to show, is nothing more nor less than the result of an evolutionary process of misapprehension by various lower Feferal courts who have misread the controlling decisions of this Court on the subject. The true and correct (and the just) Federal rule, we shall show, is not that the dispensing with any requirement of corroboration of accomplice testimony is a "rule" of invariable application, but that it is the "better practice" to require corroboration. The circumstances of the present case call for the use of such "better practice" here.

The present trial record allows us to state unqualifiedly that the petitioners Armone and Grammauta have been convicted upon the uncorroborated testimony of the ac-

complice witnesses Hedges and Godwin. The only even ostensible "corroboration" of this accomplice testimony relates to the conspiracy as a whole, and it came primarily from still other accomplice witnesses. It is familiar that in jurisdictions or in cases where the accomplice-corroboration requirement is applied, accomplies cannot corroborate each other. E.g., *People* v. *O'Farrell,* 175 N. Y. 323, 67 N. E. 588 (1903). All of the so-called corroboration of Hedges and Godwin in this case—exhaustively recited by the prosecutor in his summation (Tr. 4055-4069, 4095)—related to one or another of the larger or general features of the alleged conspiracy as a whole, or to defendants other than Armone and Grammauta. Such general or unrelated forms of "corroboration" are insufficient as corroboration of accomplice testimony of the guilt of a particular defendant, under the familiar tests applied in jurisdictions which require corroboration. E.g., *People* v. *Kress,* 284 N. Y. 452, 31 N. E. 2d 898 (1941); *People* v. *Cohen,* 223 N. Y. 406, 118 N. E. 886 (1918), Re-arg. den. 227 N. Y. 623, 125 N. E. 921.

We are not even urging this Court to depart in any precedent-shattering way from what is commonly regarded as being the established Federal rule that corroboration of accomplice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the decisions noted, *infra,* that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by *proper* corroboration.

The contention which we are here urging was duly preserved in the Courts below. Counsel for defendant Pacelli, Mr. Kasanóf—requests and exceptions in this trial by each defendant were treated as being made by all defendants wherever appropriate (see, *e.g.,* Tr. 3715)—expressly requested an instruction to the Jury that accomplice testimony must be corroborated, and the failure so to charge was expressly excepted to by Mr. Kasanof

(on behalf of all defendants); indeed the Trial Court was expressly advised that the defense was deliberately aiming at a reopening of the prevailing Federal rule on this subject (see Tr. 3701-3703, 3712-3715, 3723-3724, 4201, 4207; and see Pacelli's request to charge No. 5). Also, counsel for Armone and Grammauta expressly requested an instruction (request No. 15) "that an alleged accomplice cannot corroborate the testimony of another alleged accomplice"; this last was also discussed with the Court in colloquy preceding the instruction to the Jury, when the Court indicated that it would not so charge (Tr. 3714). The point was also extensively briefed for Armone and Grammauta before the Court of Appeals (Point V).

Holmgren v. *United States*, 217 U. S. 509, 523-524, states that "It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been criticized, disparaged or departed from in any doctrinal sense by this Court in any other decision, including *Caminetti* v. *United States*, 242 U. S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said, "This is so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U. S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States*, 244 U. S. 432, expressly undertook to examine whether there had been corroboration of the accomplice testimony (at pp. 440-442). The *Valdez* case arose in the then Territory of the Phillippine Islands; from the report of the decision in *Valdez*, and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 *et seq.*), it does not appear that the

case involved any statutory or constitutional provision applicable to the Phillipines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.g., *Sykes* v. *United States*, 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States*, 209 Fed. 525, 533 (C.C.A. 8 1913); *United States* v. *Murphy*, 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis* v. *United States*, 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States*, 266 Fed. 1012, 1014-1016 D. C. App. 1920); *Wagman* v. *United States*, 269 Fed. 568, 572 (C.C.A. 6 1920); *Morenkow* v. *United States*, 276 Fed. 293, 294 (C.C.A. 6 1921); *Rudner* v. *United States*, 281 Fed. 516, 521 (C.C.A. 6 1922); *Rossi* v. *United States*, 9 F. 2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States*, 15 F. 2d 686, 689 (C.C.A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, *e.g.*, *Arnold* v. *United States*, 94 F. 2d 499, 501, 506-509 (C.C.A. 10 1938); *Stewart* v. *United States*, 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U. S. 779; *Gordon* v. *United States*, 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U. S. 862; *Smith* v. *United States*, 224 F. 2d 54, 60 (C. A. 5 1955); *Stanley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6 1957); *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8 1965); *Masters* v. *United States*, 351 F. 2d 105 (C.A. 8 1965).

Of the cases cited in the preceding paragraph we especially invite the Court's attention to the language of the Eighth Circuit in the *Sykes* case *supra;* and to the *Murphy* case from the Northern District of New York, *supra*. In the latter case, the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case, and to similar decisions of the lower Federal courts, said (253 Fed. at 406) that those cases do "not hold, as contended for by counsel, that corroboration of an accom-

plice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached." But when the accomplice witness has been impeached, the *Murphy* Court said, "The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *."

We submit that this stalwart and discerning language written in 1918 in the *Murphy* case, *supra,* embodies the correct historical and traditional perspective of the Federal accomplice-corroboration rule, and that it states a theme which this Court, at long last, should itself restate in an opinion on the merits of the instant certiorari application.

III

If the matter of overt act 10 and the alleged conversation about a counterfeit bill did not come before this Court in the humanly disastrous setting of criminal convictions with heavy jail sentences, one might content oneself with noting that what happened in the trial regarding this matter was really rather preposterous and that the subsequent positions taken by the Government and both of the Courts below are likewise preposterous. As it is, with petitioner Armone facing what will almost surely turn out to be a life sentence* (and with Grammauta serving an 8-year sentence), this is no case merely for droll reflections upon the eccentricities of the decisional processes in the lower Courts. The eccentricities in question unfortunately require serious attention indeed.

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*In view of his age (48 years) and his physical condition.

The counterfeit bill item in relation to the overt act 10 problem arises, it will be recalled, (1) from testimony by Hedges and Godwin that after Godwin had obtained a $100 counterfeit bill from a gambling friend named Mickey and after this bill had been given by Godwin to Andy Dillon* at Lulu's Bar (where bookmaking was apparently going on), Joseph Armone reproached Hedges and Godwin that the counterfeit bill might lead to an investigation; and (2) from the fact that no such counterfeit bill item had been before the grand jury, so that the mistake in instructing the jury that overt act 10 involved the counterfeit bill incident meant also that a non-alleged overt act was *inadvertently* submitted to the jury and in an overall setting of much facual and instructional confusion. In short, petitioners, so far as may be known (since no one can know what the jury actually decided about overt act 10), may have been convicted on a charge not alleged in the indictment and without jury unanimity, and almost surely without jury rationality of decision. Even more serious, and ultimately dispositive as rendering the convictions invalid, is the point that in any event Joseph Armone's alleged expression of concern about the counterfeit bill incident could not possibly qualify as an "overt act in furtherance" of the alleged narcotics conspiracy.

The Trial Court admitted the testimony of Hedges and Godwin concerning the counterfeit $100 bill over strenuous defense objection; we contended that the subject of this testimony was improper as "other crimes" testimony and was not an overt act and not in furtherance of the conspiracy. See 316a-320a, 495a-496a, 501a-502a. In a narcotics conspiracy, the government must prove an unlawful agreement and an overt act committed pursuant to the agreement. *United States* v. *Agueci*, 310 F. 2d 817 (C. A. 2 1962), cert. denied 372 U. S. 959. Assuming *arguendo*

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* Dillon is concededly not involved in the narcotics conspiracy charges herein.

that the passing of this counterfeit bill and the circumstances surounding it took place, and that it could be logically inferred by the Jury that Armone was concerned about a narcotics investigation, at the very most it could be admitted against him on the theory of knowledge. Knowledge of the existence of a conspiracy to violate the narcotics laws is not a crime. Knowledge is not an overt act. Cf. *Causey* v. *United States,* 352 F. 2d 203, 207 (C. A. 5, 1965).

Nor was Armone's alleged remark about fear of an investigation admissible on a theory of concealment of the conspiracy; it does not even remotely meet the test of *Grunewald* v. *United States,* 353 U. S. 391 in this respect. The Court below suggests (Appendix B hereto, *infra*) that the jury could have legitimately inferred that the purpose of the conversation concerning the counterfeit transaction was to warn Hedges and Godwin of the danger of exposing the narcotics conspiracy. But even if such an inference could legally be drawn (which we deny—see next paragraph herein) from a mere expression of worry over danger of investigation, it would still be necessary to link up such expression of worry with narcotics. The $100 counterfeit bill was in nowise connected with narcotics. One of the original two parties to the counterfeit transaction was not involved in the norcotics conspiracy. While Godwin was on the periphery of the conspiracy, Dillon had absolutely nothing to do with narcotics.

What of the fanciful theory that the counterfeit transaction was an overt act because if co-conspirators are warned to be on the alert, this constitutes an affirmative act of concealment. This theory—that Joseph Armone's alleged expression of worry about investigation was an "affirmative act of concealment"—is legally and logically unsound, i.e., even if Armone was talking about a narcotics investigation (which the record negates), such mere talking is not an "overt act" of "concealment". The very cases mentioned by the Court below are among the leading au-

thorities which deal restrictively with prospective efforts to enlarge the scope of conspiracy proofs by resort to such theories of "concealment". *Grunewald* v. *United States,* 353 U. S. 391; *Mount* v. *United States,* 333 F. 2d 39 (5th Cir.), cert. den. 379 U. S. 900; *Atkins* v. *United States,* 307 F. 2d 937 (9th Cir.). *Grunewald,* in particular emphasizes the intrinsically secret and furtive character of conspirators' activities and of their hopes to avoid detection, and *Grunewald* points out that to treat all such intrinsic conspiratorial furtiveness as overt acts of concealment would wipe out the statute of limitations and hearsay-restrictions in conspiracy cases. In our case no "act" of "concealment" is even involved. A conspirator who in effect says to colleagues, "I'm worried, fellows, that we may get caught" is not committing any "act" at all, much less an "act" of "concealment". There is no testimony that Armone told Hedges and Godwin even so much as to be careful, much less to suspend or more thoroughly conceal any narcotics activity, or to destroy or conceal any evidence, etc., as, *e.g.,* in the *Mount* and *Atkins* cases, *supra,* cited by the Court below.

The basic injustice of the way in which the overt act 10 problem has been administered by the Courts below cannot be fully appreciated without some additional reference to the procedural facts at the trial relating to this subject. The Court charged the jury that overt act 10 related to the counterfeit transaction (454a, 521a-522a, 528a). For reasons of statute of limitations, it further charged the jury that they must find the commission of one of the two overt acts 10 and 11 in order to find defendants guilty. This instruction was requested by the Government (535a). Nowhere in its instructions to the Jury did the Court charge the Jury as to any non-alleged overt acts which may have been proved in this trial; the submission to the Jury stands exclusively upon overt acts nos. 10 and 11.

The prosecutor, Assistant United States Attorney Howard Jacobs, submitted this case to the grand jury. He

did not submit any evidence to the grand jury about any of the counterfeit transactions. Mr. Jacobs prepared this case for trial. Mr. Jacobs filed a bill of particulars as to overt act 10, which did not refer to the counterfeit transactions, because overt act 10 as alleged in the indictment could not, in the absence of proof before the grand jury, pertain to the counterfeit transactions. Mr. Jacobs tried this case. He knew that overt act 10 did not apply to the counterfeit transactions. He never intended nor contemplated that the counterfeit transaction would become an overt act. If he had, he would have submitted testimony before the grand jury. If he had, he would have answered counsels' objections to the admissibility of the counterfeit transactions (*supra*) by contending that such evidence was admissible on the theory that they were overt acts in furtherance of the conspiracy. He never so contended.

Under all the circumstances, Mr. Jacobs knew or had to know that when the Trial Judge charged the jury on his own initiative that overt act 10 related to a $100 counterfeit bill, it was making a mistake. Government counsel had a duty to the Court to apprise it of the mistake being made. He had innumerable opportunities to help the Court rectify this error. The prosecutor, thoroughly conversant with every facet of the Government's case, cannot sit idly by and permit the Court to err because the overt act mistakenly charged may be stronger in content or otherwise somehow more advantageous to the Government than the one testified to before the Grand Jury (*infra*).

On July 8, 1965, after the jury verdict, the Court summoned counsel to advise them of a problem which had come to the Court's attention, after the verdict, to the effect that overt act no. 10 could not have been intended by the Grand Jury to relate to the alleged incident of the counterfeit bill because there was no testimony on that

subject before the Grand Jury and that overt act no. 10 instead must have related to an alleged conversation between Hedges and the defendant Joseph Armone in which the former made a request for more money. The Court stated that this alleged conversation "has perhaps more significance" than the alleged counterfeit incident, and that Hedges' Grand Jury testimony had been made available to defense counsel. The Court also remarked that "I think it is a mistake in which we all participated" (545a). See Tr. of July 8, 1965 (separately paged—docketed as R. 4676-4690), 549a-554a.

It is clear that an error did occur in the instructions to the Jury concerning overt act 10, in that the Jury were told this related to the alleged counterfeit bill incident, whereas the only item (if any) to which it could relate was the alleged conversation between Hedges and Joseph Armone about the former's request for more money. In view of the prominent use made by the Government of the counterfeit item (see the Government's summation at Tr. 4054, 4065, 4118), it is dubious, to say the least, whether the Hedges-Armone conversation about more money "has perhaps more significance", as the Court suggested (*supra*)—particularly since the latter item depended solely on Hedges' own basely discredited testimony.

In the proceedings on July 8, 1965, the Court intimated, as seen, that the defendants had not been prejudiced because "we all participated" in the mistake (545a).

We are sure that this Court's view with respect to this unusual occurrence is not going to be based on so simplistic a ground as that "we all participated" in the mistake, and that this Court will give consideration to the following questions which we respectfully deem to be determinative of the issue:

1. Can a verdict of conviction in a criminal case on a charge of conspiracy stand when the essential issue of statute of limitations was presented to the Trial Jury upon only two overt acts, one of which was con-

cededly not charged or intended to be charged by the Grand Jury, and where in the nature of the situation it is impossible to know whether the Trial Jury would have convicted if the improperly submitted overt act had not been submitted for their consideration?

2. Do the circumstances justify any conclusion of "harmless error", waiver or estoppel, where the Government itself (being obviously chargeable with correct knowledge of its own case) stood by and let the mistake be lodged with finality despite the intensive and repeated colloquies which were had concerning other factual details of overt act 10 during the instructions to the Jury*, where also defense counsel were not given *all* of the Grand Jury minutes and were deprived post-haste of the Hedges' Grand Jury testimony immediately upon the conclusion of Hedges' trial testimony, where also defense counsel had no reason to be alerted to any *total* absence from the Grand Jury minutes of testimony concerning the alleged counterfeit bill incident because for all they knew Narcotics Agent Dugan, for one, might also have testified on that subject before the Grand Jury (and they never got his Grand Jury testimony), and where even the Court itself did not discover the mistake until after the verdict?

The abortiveness worked by all of the above happenings in regard to the processes of fair and rational trial on the overt act issues of the indictment finds no "all fours" precedent. For decisions which in one way or another indicate disapproval of prosecutive procedures in conspiracy and other cases whereby conviction is obtained on the basis of matters not charged in the indictment, cf. *United States* v. *Negro*, 164 F. 2d 168, 171 (C.C.A. 2 1947); *Patterson* v. *United States*, 222 Fed. 599, 650 (C.C.A. 6 1915); *Thomas*

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* See the petition for certiorari of co-defendant Pacelli herein, pages 33-41.

v. *United States*, 151 F. 2d 183, 186-187 (C.C.A. 6 1945); *United States* v. *Leggett*, 312 F. 2d 566, 573-574 (C. A. 4 1962); *United States* v. *Roach*, 321 F. 2d 1 (C. A. 3 1963).

As to the question of waiver or estoppel, cf. the recognition by this Court that "* * * trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus* v. *Balkcom*, 333 F. 2d 496 (C. A. 5th Cir. 1964) * * *." *Henry* v. *Mississippi*, 379 U. S. 443. See also *United States* v. *Puff*, 211 F. 2d 171, 180 n. (C. A. 2 1954), cert. den. 347 U. S. 963 ("* * * in a case such as this we should be reluctant—if not unwilling—to deem a substantial claim of error foreclosed by waiver of counsel"). To similar effect see *Williamson* v. *United States*, 332 F. 2d 123, 132 (C. A. 5 1964). *Bacino* v. *United States*, 316 F. 2d 11, 14 (C. A. 10 1963), collects the authorities for the familiar rule that if it is within the range of reasonable possibility that a trial error may have affected the verdict, the accused does not have the burden of showing an adverse effect.

In the Court below the Government contended that it is conceivable that the jury disregarded overt act 10 and found the defendants guilty on overt act 11. *United States* v. *Robbins*, 354 F. 2d 741 (C. A. 2, 1965), held, under analogous facts, that since it was impossible to ascertain the exact basis for the defendant's conviction, the conviction must be reversed.

In this hard-fought case where convictions and severe jail sentences have been obtained by the Government by means so dubious and even offensive as those portrayed under our Reasons I and II, *supra*, the chaotic disruptions and irrationalities which were imported into the trial processes of this case by the circumstances which we have treated under this Reason III, strongly favor the granting of certiorari to correct the grave maladministration of federal criminal justice which has here occurred.

Conclusion

Petitioners Armone and Grammauta respectfully adopt the points urged in the companion petitions herein, insofar as applicable to our case and consistent therewith. We also respectfully request leave to preserve, in the event of the granting of certiorari, the points presented in our Questions Presented no's. 5 to 8, inclusive.

It is respectfully submitted that this joint petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
Attorney for Petitioners,
Joseph Armone and
Steven Grammauta.

Appendix A

Judgment of Affirmance.

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and sixty-six.

Present: Hon. J. Edward Lumbard, Chief Judge.
Hon. Irving R. Kaufman,
Hon. Wilfred Feinberg,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Alfred Armone, et al.,
Defendants,

Joseph Armone, Stephen Grammauta, Vincent Pacelli, Nicholas Viscardi,
Defendants-Appellants.

Appeal from the United States Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

Appendix B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—September Term, 1965.

(Argued March 4, 1966 Decided July 8, 1966.)

Docket No. 30135

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH ARMONE, STEPHEN GRAMMAUTA, VINCENT PACELLI, and NICHOLAS VISCARDI,

Appellants.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN, *Circuit Judge,* and FEINBERG, *Circuit Judge.**

Appeals by four appellants from judgments of conviction for violation of the federal narcotics laws, 21 U.S.C. §§ 173, 174, after a trial by jury before Dudley B. Bonsal, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

JEROME LEWIS of Brooklyn, N. Y., *for defendants-appellants Armone and Grammauta.*

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* Argument heard as District Judge, sitting by designation.

Appendix B.

E. BARRETT PRETTYMAN, JR. of Washington, D. C. (Robert Kasanof and Albert J. Krieger of New York, N. Y., on the brief), *for appellant Pacelli.*

EDMUND A. ROSNER of New York, N. Y. (Edward Cherney, on the brief), *for defendant-appellant Viscardi.*

ROBERT G. MORVILLO of New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Howard L. Jacobs, Otto G. Obermaier, John S. Allee, on the brief), *for appellee.*

FEINBERG, *Circuit Judge:*

Four defendants appeal from convictions of violating the conspiracy provision of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The single-count indictment named twenty-eight co-conspirators, twelve of whom were charged as defendants. The trial was originally scheduled to begin on April 27, 1965, with eight of the named defendants; the remaining four had not yet been apprehended. On that morning, two of the defendants became fugitives, requiring a one-week continuance. The trial of the other six defendants began on May 3, 1965 before Judge Bonsal and a jury.[1] On June 22, 1965, the jury convicted appellants Joseph Armone, Stephen Grammauta, Vincent Pacelli and Nicholas Viscardi, and acquitted Alfred Armone and Alexander Schoenfeld. On July 29, 1965, Judge Bonsal sentenced Joseph Armone to fifteen years, Grammauta to

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[1] The six remaining defendants were severed.

eight years, Pacelli to eighteen years, and Viscardi to five years.[2] We affirm the convictions as to all four appellants.

Since the main arguments in this court are not directed to the sufficiency of the evidence, the facts developed at the seven-week trial will not be outlined in detail.[3] Viewing the government's case after a jury verdict of guilty in the light most favorable to the prosecution, as we must, it was, briefly, that appellants, together with the co-defendants and co-conspirators, conspired from 1956 through 1960 to import and distribute heroin in the United States. The drugs originated in France, and would be smuggled into this country with the aid of couriers, who usually travelled as part of their occupations. For example, Clarence Aspelund, a seaman, would transport heroin for exporter Marius Aranci in Marseilles, and Charles Bourbonnais, a flight purser, would bring in the drug for Felix Barnier in Paris. Mauricio Rosal, a Guatemalan ambassador, and Etienne Tarditti, a French businessman, also acted as couriers for Barnier.

The couriers intially delivered the drugs, once in this country, to Joseph Cahill, whose base of operations was New York City; eventually, Charles Hedges and Nicholas Calamaris took Cahill's role. Joseph Armone, one of the importers, would direct the eventual sale of the drugs to domestic wholesalers Vincent Pacelli and Michael Ricucci. Stephen Grammauta and Arnold Romano were also importers. Nicholas Viscardi acted as a storer of the narcotics pending delivery to wholesalers.

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[2] Pacelli and Armone were also fined $20,000.

[3] Appellants do contend, in urging reversal, that the evidence disclosed multiple conspiracies, rather than a single conspiracy, and therefore they were not connected up with the alleged single conspiracy. This point will be discussed *infra*.

Appendix B.

Many transactions were detailed at the trial. In 1956, Aspelund met Cahill in New York, and thereafter reported to his principal (Aranci) that Cahill had requested narcotics. A six or eight kilo delivery, by way of Norfolk (because of complications in the New York harbor), was the fruit of this meeting. For the next three years Aspelund would bring in heroin for Cahill about three times a year. Bourbonnais would also bring in narcotics for Cahill, several kilos at a time; both couriers were paid by Cahill. Hedges, meanwhile, became a domestic deliverer for the latter, and was introduced to the conspirators' rendezvous at the Amvets Club; he was eventually promoted to direct dealings with the couriers.

Heroin from Pierre Roulet, an airline steward, would be taken by Hedges at first to Cahill's apartment, and later on to his own, where it would be picked up by Viscardi. Hedges would also deliver to various automobiles under the control of conspirators. In 1958, Hedges was introduced to Pacelli, and arrangements were made for deliveries directly to him by Hedges. In November 1958, Hedges made a delivery to Grammauta, who drove off with Viscardi.

On occasion, Hedges would meet with Joseph Armone at the Amvets Club to discuss some aspect of the dealings with the exporters' couriers. Payments from wholesalers were often turned over to Armone or Grammauta by Hedges, as the latter became involved in sales by the importers. Pacelli would sometimes furnish an automobile for Hedge's transportation. Hedges would pick up heroin at Viscardi's apartment, where it had been stored, for delivery to wholesalers, and he became a liaison between Armone and Pacelli. James Godwin, referred to in testimony quoted below in connection with the overt act problem, was Hedges' cousin; Godwin was often a witness to parts of the transactions involving Hedges and Pacelli.

Appendix B.

During a lull in 1959-1960, Armone told Hedges that they would "get started" soon after a few things were "straightened out." Activity began again in February 1960, when Pacelli asked Hedges if he could obtain some heroin. Hedges relayed the request to Armone, who complained that Pacelli was not paying in advance, or a high enough price. Armone eventually relented and the transaction was consummated. A few months later, Hedges demanded more money from Armone for himself; the latter authorized an extra $50. In the fall of 1960, certain couriers were arrested; Hedges was convicted in the District of Connecticut in March 1961.[4] Godwin saw Armone that month in an attempt to raise collateral for Hedges's appeal bond. Armone said that he had no money; a few months later Godwin pointed out that unless Hedges was given some help, as in raising bail, he might cooperate with the government. Armone said that another conspirator had gone to prison and "kept his mouth shut and Charlie could do the same." In September 1964, the indictment in the present case was filed, and Hedges became the prosecution's leading witness.

The four appellants make various contentions on appeal. Their arguments will be considered, under the name of the defendant primarily pressing the point. These points raised by defendant Pacelli will be dealt with first; thereafter, to the extent that they have not already been covered, the arguments of Armone and Grammauta, made jointly, and Viscardi will be considered.

I. Pacelli

§ 174 *Inference*

Pacelli first argues that the trial judge's handling of the statutory inference set forth in 21 U. S. C. § 174 violated

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[4] *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

his rights under the Fifth and Sixth Amendments. The words of the statute are:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

This provision was held constitutional over forty years ago. *Yee Hem* v. *United States,* 268 U. S. 178, (1925); see *Orozco-Vasquez* v. *United States,* 344 F. 2d 827, 829 (9th Cir. 1965). *United States* v. *Sorenson,* 330 F. 2d 1018, 1021 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965). Referring to this section, Judge Bonsal told the jury that:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
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> • • • • •
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> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that they have not offered an explanation as to their possession. You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally

imported into the United States unless he has given you a satisfactory explanation of his possession.

Pacelli did not testify at the trial.[5] He first claims that this charge was an adverse comment on his failure to take the stand, depriving him of his Fifth Amendment rights not to be compelled to be a witness against himself and of due process. Pacelli also argues that the charge created a presumption against him because he did not take the stand and thereby violated 18 U. S. C. § 3481.[6] Appellant relies heavily on the recent Supreme Court decision in *United States* v. *Gainey*, 380 U. S. 63 (1965). That case dealt with a provision in the Internal Revenue Code, which the Court recognized as similar to section 174. *United States* v. *Gainey, supra* at 64-65 n. 2. The Code provides that the presence of a defendant at a site where the business of a distiller is being carried on unlawfully is sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury." Int. Rev. Code of 1954, § 5601(b)(2). In affirming the conviction of defendant Gainey, the Court upheld a charge similar to that given by Judge Bonsal and specifically rejected the contention that the charge could "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey, supra* at 70-71. Similarly, in *United States* v. *Secondino*, 347 F. 2d 725 (2d Cir.), cert. denied, 382 U. S. 931 (1965), this court, relying on *Gainey* reached a similar conclusion with respect to section 174. See also *United States*

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[5] Neither did appellant Armone.

[6] In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

v. *Christmann*, 298 F. 2d 651, 652-53 (2d Cir. 1962) (dictum); *Williams* v. *United States*, 328 F. 2d 256, 262 (8th Cir.), cert. denied, 377 U. S. 969 (1964).

Pacelli seeks support not from the holding of *Gainey*, but from its advice that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." *Id.* at 71 n. 7. We agree that this would be the better practice and suggest it be followed in the future. But the holding of *Gainey* is that mention of the statute does not require reversal so long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71. Defendant counters that Judge Bonsal, unlike the trial judge in *Gainey*, failed in this command because he did not make it clear that a defendant was not required personally to testify and that the "explanation" could come from other evidence in the case. Pacelli urges with some force that the government's own request for charge would have told the jury that the explanation could have come from "the evidence in the case." However, Judge Bonsal did charge later in his instructions, after noting that cer- did charge later in his instructions, after nothing that certain defendants had testified, that:

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them or as any basis of any presumption or inference unfavorable to them. You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Somewhat earlier he had charged:

> Now, I mention these two defendants purely by way of example and for nothing else, because you will review the evidence and consider what reasonable inferences you find may be drawn therefrom with respect to each of the six defendants. As I said, it is for your determination what reasonable inferences may be drawn from the evidence. But I remind you again that after considering all of the evidence as to a particular defendant you find that two reasonable inferences may be drawn, one consistent with his innocence and one consistent with his guilt, you must acquit the defendant . . .

It would be hypertechnical, in the face of these instructions, to convert a general and accurate explanation of the section 174 permissible inference into a comment on defendants' failure to take the stand.[1] Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference."

Allegedly prejudicial publicity

Appellant Pacelli next contends that publicity destroyed his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), and, in federal trials, buttressed by the supervisory power, see *Marshall* v. *United States*, 360 U. S. 310 (1959). The errors specifically claimed are denials of motions for

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[1] In the portion of the charge dealing with the statutory inference, it would again be wiser practice to state also that the "explanation" can come from any evidence in the case and that the total evidence should be considered.

a change of venue, a continuance, a mistrial, and an examination of the persons responsible for the publications here involved.

Pacelli was indicated on September 30, 1964. On January 11, 1965, the front page of a New York City newspaper with a large circulation featured a photograph of a young woman in what appears to be lingerie, and the banner headline FEAR MOB SLEW DOPE BIG'S GIRL. Bold face type over the caption asked Was She Killed To Seal Her Lips?[8] On page three appeared a banner headline and a sub-headline: Fear Dope Big's Girl Was Rubbed Out [and] Dancer Talked to Grand Jury And Promptly Vanished. There was another eye-catching picture of the young lady.[9] On

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[8] The caption stated, in part:

> Nancy Sue Shelton . . . is missing. Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with. Nancy disappeared three months ago . . . after testifying before a grand jury looking into dope smuggling. Her boyfriend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance. . . . Story on page 3

[9] The story said, in part;

> But Nancy Sue hasn't been seen for more than three months now, and the feds believe she is dead. Murdered—because she knew too much.
>
> * * * * *
>
> She was Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic.
>
> 200 Million Dope Ring
>
> Federal narcotics agents said that Pacelli was a member of a ring which smuggled more than $200 million worth of dope into the U. S. over a five-year period, even using Mauricio Rosal . . . as a courier. Rosal is doing a 15-year stretch.
>
> On Sept. 23, agents had Pacelli under surveillance at Lexington Ave. and 73d St. when Nancy Sue drove up in a taxi.

(Footnote continued on following page)

January 12, another article on the subject appeared in the same newspaper under a prominent headline (Dope Mob Ordered Nancy Sue to Scram) on page five. Both stories identified Pacelli as the missing girl's boy friend "who trafficked in narcotics."

Pacelli also points to a magazine article published approximately mid-way through the trial. The article appeared in a semi-scientific magazine addressed to laymen, with a national circulation of one and one-third million copies. Its contents are divided into departments, of which "Cars and Driving," "Home and Shop," and "TV, Radio and Electronics" are representational. In the June 1965 issue (apparently published about June 1), there appeared a six-page article, not referred to on the cover, but listed in the inside table of contents under "Special Reports." The article began mid-way through the issue, and was entitled "Our top anti-narcotics agent tells the inside story of how three nations combined to fight [the following in large type] The Dope-Smuggling Diplomats." The article is by-lined "by Henry L. Giordano as told to James C. G. Conniff." Mr. Giordano is identified under his photograph as Commissioner of the United States Bureau of Narcotics.

(Footnote continued from preceding page)

Pacelli, 43, of 422 E. 118th St., paid her fare and helped her out of the cab The couple strolled on 73d St. to Third Ave. There, the agents took Pacelli into custody on a narcotics charge.

* * * * *

[Nancy Sue failed to return before the Grand Jury to finish her testimony shortly thereafter, the story continues.]

The day after Nancy Sue testified the feds caught up with a longtime fugitive . . . a business associate of Pacelli.

The authorities said the underworld assumed Nancy Sue talked and that others might be nabbed if she talked some more.

* * * * *

If by remote chance you see her, let the government know. Your anonymity will be protected.

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The article describes the smashing of a narcotics smuggling ring which utilized diplomats as couriers, and is written in a popular, although unsenational, style. It identifies and has photographs of seven co-conspirators who were named in the indictment in the instant case, including one witness at the trial, and also names defendant Cahill (who was servered). The article did not mention any defendant tried below. On the day of publication, motions for a mistrial were made based on the article. The motions were denied, as was a later motion to vacate the verdict which was based in part on allegedly prejudicial publicity.

Since argument of this case, the Supreme Court has handed down its opinion in *Sheppard* v. *Maxwell,* —— U. S. —— (1966). In considering the question of prejudicial publicity here raised, we have carefully read the *Sheppard* case and take as our governing standard the following (*id.* at):

> Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

In *Sheppard,* the barrage of publicity reached carnival proportions, the jurors were "without adequate directions not to read or listen to anything concerning the case," there was no doubt that "this deluge of publicity reached at least some of the jury," "bedlam reigned at the courthouse," and the arrangements between the court and news media "caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.'" The Supreme Court

stated that the basic reason for vacating the conviction was that the trial judge "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.* at

None of these conditions can fairly be found in this case. There was no barrage of publicity. Complaint is made only of the publications described above. The two newspaper articles appeared on successive days in January, sixteen weeks before trial. Thereafter, until the June 1 magazine article, apparently nothing was written or said in the news media which would cause defendants to complain. A good part of this is undoubtedly due to the commendable foresight of the trial judge. A month before the trial, he asked the United States Attorney (with the concurrence of defense counsel) to request local news media not to publicize the trial. See *United States* v. *Bentvena*, 319 F. 2d 916, 934 (2d Cir.), cert. denied, 375 U. S. 940 (1963). The jurors were adequately and periodically warned not to read or listen to any accounts of the case in the media, and, in conducting the voir dire about the publications, the judge carefully walked the tightrope between exploring the jurors' knowledge and titillating their curiosity about material previously unknown to them.

Finally, we cannot fairly say, as the Court did in *Sheppard*, that there is no doubt that the publicity reached "at least some of the jury."[10] As to the magazine article published during the trial, the court below promptly inquired of the jury as follows:

> Before we adjourn for the day I would just like to tell you, you remember, I had been mentioning to you every day about any possible articles, radio or

[10] All jurors but one had read about the case in the newspapers or heard broadcasts about it. —— U. S. at ——.

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TV programs. My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have heard in the course of the trial. And since that has been brought to my attention, I would just like to ask each of you whether you have seen that article?

Well, now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

We see no reason to disbelieve the jurors' negative response regarding an article which had just been published in a magazine of somewhat limited appeal. As to the newspaper articles published before trial, at the beginning of the trial the court conducted a detailed voir dire which included the newspaper reading habits of the prospective jurors. The judge asked all members of the panel to advise him if they had read or heard anything about narcotics in general which would interfere with their ability to render a fair and impartial verdict, and if they had read anything in the press or heard anything relating to the defendants on trial, and received negative responses. Eight of the jurors finally selected were asked which newspapers they read; two said they read the newspaper involved, and one said he read "most of them." Each juror was asked whether he knew of any reason preventing him from rendering a fair verdict, with a negative response in all cases. No objection appears to have been taken after the voir dire regarding the failure specifically to ask four of the jurors which newspapers they read. The newspaper articles appeared some

sixteen weeks before trial. We regard this time lag between publication and trial as most significant. As we recently had occasion to say:

> [T]he situation here is in no way comparable to that in *Marshall* v. *United States, supra,* where the Court reversed a conviction for unlawfully dispensing drugs where it was shown that seven jurors had been exposed to news articles which disclosed the defendant's prior criminal record and other information after the same material had been excluded from the trial by the trial judge. By direct contrast, the adverse publicity in the present case appeared several months prior to the trial and the importance of this time-lag cannot be overlooked. Both the Supreme Court and this court have indicated that the length of time between the publication of adverse publicity and the empanelling of the jury is a significant factor in assessing claims of prejudice resulting from pre-trial publicity. See *Beck* v. *Washington,* 369 U. S. 541, 556-558 (1961); *Stroble* v. *California,* 343 U. S. 181 (1952) (six weeks); *United States ex rel. Brown* v. *Smith,* 306 F. 2d 596, 603 (2d Cir. 1962), *cert. denied,* 372 U. S. 959 (1963) (three months). Since the articles involved here were twelve weeks old at the time the jury was empanelled, it is highly unlikly that they were retained in the memories of the jurors. As Judge Weinfeld has pointed out, it is a fact that "frequently in this large metropolitan district prospective jurors show little recall of past widely publicized matters . . ." *United States* v. *Kahaner,* 204 F. Supp. 921, 924 (S. D. N. Y. 1962).

United States v. *Bowe,* —— F. 2d —— (2d Cir. 1966).

Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion.

"Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall* v. *United States*, 360 U. S. 310, 312 (1959). Under all of the circumstances of this case, including the time of the publicity, the steps taken by the trial judge to curb its effect on jurors, his careful exploration of its impact and the response of the jurors, we do not feel that the court below committed error. We do not believe a contrary result is required either by *Sheppard* or the cases cited in Pacelli's brief. We have already discussed the former; as to the latter, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), involved a trial which "had become the *cause celebre*" of a small community. Eight of the twelve jurors selected thought petitioner was guilty in advance of trial. In *Marshall* v. *United States, supra*, several jurors read, during the trial, articles disclosing other crimes by petitioner. Here, of course, there is no evidence that jurors had read, much less remembered, the particular articles. *Estes* v. *Texas*, 381 U. S. 532 (1965), was another *cause celebre* involving a televised trial, and *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), involved a televised confession viewed by several members of the jury. The other authorities cited to us are equally distinguishable.

Overt act 10

The next asserted error is the treatment of an overt act, number 10 in the indictment. We note at the outset of discussion of this issue that the narcotics statute here involved contains a conspiracy provision which, unlike the general conspiracy statute, 18 U. S. C. § 371, does not in terms require the doing of "any act to effect the object of the conspiracy." One district court has concluded that an overt act need not be proven under 21 U. S. C. § 174.

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United States v. *Gardner* (202 F. Supp. 256 (N. D. Cal. 1962); *cf.* Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 948 (1959). As the government does not urge this ground, and as we believe the trial court committed no error in instructing the jury regarding the overt act, we do not think it necessary to explore this issue.

Of the eleven acts alleged in the indictment, only two were submitted to the jury; the trial judge held that the statute of limitations barred consideration of the other nine. The indictment alleged as overt act 10 that "in or about March of 1960," Joseph Armone was "in the vicinity of 122 Second Avenue, New York, New York." Thereafter, the government in a bill of particulars specified the act as taking place "during March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City." 207 Second Avenue was, of course, a different address from that specified in the indictment—122 Second Avenue.

At the trial, there was evidence that in April or May 1960, Hedges had a conversation with Armone in Lulu's Bar (conceded here to be located at 207 Second Avenue) during which Hedges complained about the amount of his payments. There was also testimony of a conversation between the same persons at the same place and some time in the same months concerning a counterfeit $100 bill passed by Godwin, Hedge's cousin and one of the co-conspirators. Hedges testified that in Lulu's Bar Joseph Armone told him that a counterfeit $100 bill given "them" by Godwin would cause trouble in the form of an investigation. Godwin gave testimony corroborating this conversation.

During his charge, Judge Bonsal read the allegation of overt act 10 in the indictment and stated:

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act

number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges and Godwin concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

After some deliberation, the jury requested that the testimony relating to overt acts 10 and 11 be read to them. Thereafter, pursuant to agreement of the parties, the judge read to the jury in connection with act 10 the testimony of the conversation at Lulu's Bar concerning the counterfeit bill. As already noted, it is conceded here that Lulu's Bar is at 207 Second Avenue. The judge also again read the allegations of the indictment regarding act 10. It will be recalled that this referred to Armone's being in the vicinity of 122 Second Avenue. More deliberation followed, and then the following note came from the jury:

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to re-hear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.
>
> These two locations are five blocks (approximately) apart.
>
> Can these [scratched out]
>
> [over]
>
> Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another, separate event?
>
> Respectfully,
>
> C. Burquist

The court thereupon told the jury that "everything you say here is exactly the truth" and that it was for them to determine whether 122 Second Avenue is in "the vicinity of" Lulu's Bar and the restaurant across the street. The jury was told to use its common sense. At no point did any defendant claim that the testimony concerning counterfeit money did not bear on overt act 10 or object on the ground that overt act 10 was in fact something different. In fact, as indicated above, defense counsel cooperated in selecting the testimony to be read to the jury.

A few weeks after the verdict, the trial judge summoned counsel to tell them he had learned that there had been no testimony relating to the conversation about the counterfeit bill before the Grand Jury. The judge believed that the Grand Jury in alleging overt act 10 had apparently intended the conversation in which Hedges asked for higher payments (that conversation also took place at Lulu's Bar at 207 Second Avenue). The judge thought it was "a mistake in which we all participated."

From this relatively simple set of circumstances and a trial judge's effort to bend over backwards to be fair, defendants have spawned a bewildering array of contentions, some of them inconsistent with each other. Pacelli's will be considered first. He first argues that the jurors' note meant to ask whether the "vicinity" of 122 Second Avenue can be said to include 122 Second Avenue itself. His theory is that the jury, having heard still other evidence concerning events at that address,[11] and not knowing of the bill of particulars specifying 207 Second Avenue, thought that perhaps 122 Second Avenue could not be deemed (in law) to be in the vicinity of itself, and wanted to know. If this

[11] There was testimony, not referred to above, that the Amvets Club at 122 Second Avenue was the scene of many events referred to in the evidence.

interpretation is correct, Pacelli continues, the judge's response could only be confusing because it focussed on a conversation at 207 Second Avenue. We think that this interpretation of the jury note—which was never raised below—does not rise to the level of "strained." The note explicitly refers to "two locations," including Lulu's Bar (which is at 207 Second Avenue), and their distance apart, and asks whether 122 can be thought of as "the vicinity," or whether it is the location of a different event. The note could only be interpreted reasonably as asking for the definition of "vicinity" vis-a-vis the two locations. If anything, by eliminating the possibility raised by Pacelli that the jury might tie up overt act 10 to other testimony of events at 122 Second Avenue, the trial judge helped, rather than harmed, defendants. Appellant argues that the possibility of confusion remained, thereby vitiating the verdict. However, the jury's note makes clear that it was following the testimony closely and was focussing sharply on the limited issue the trial judge had left with it.

Pacelli also claims he was deprived of a unanimous verdict because jurors might agree that act 10 was proven for different reasons; *i.e.*, some might consider events at 122 Second Avenue, while others might find the conversation at 207 Second Avenue occurred. Armone and Grammauta similarly argue that the court refused to charge that the jury had to agree unanimously on one or the other of the overt acts submitted to it, and not merely agree that an overt act had been proven. Whether this fragmentation of the unanimity requirement is impermissible need not be explored. As for Pacelli's claim, the judge's reply to the note in effect eliminated this possibility from the case. As for Armone and Grammauta's argument, the court's charge that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 and 11, in fact,

took place . . . Now, if you find beyond a reasonable doubt that at least one of these two overt acts, 10 and 11, was committed," coupled with his instruction that the verdict be unanimous, adequately answers this objection. "You" and "your" obviously refer to the jury as a body; any supposition that the jurors would take the instructions to mean that they can fragment their findings on the elements of the offense (taking overt acts *arguendo* to be "elements" in this context) is strained conjecture.

Accepting the correct interpretation of the jury note *arguendo*, Pacelli next contends that there was no evidence of the distance between 122 and 207 Second Avenue, and the subject was not one that the jury could notice; hence, the jury either guessed at the distance or took a view, both of which courses are impermissible. Therefore, there was no way the jury could decide vicinity *vel non*, and the issue as to act 10 should not have gone to the trier of fact. This argument was again not made to the trial judge at any time and for that reason, among others, cannot prevail here. In fact, appellants did not object to the court's endorsement of the jury's supposition as to the distance between the two places by telling it "everything you say here is exactly the truth."[12] In addition, there was sufficient evidence from which the jury could approximate the distance between the Amvets Club and Lulu's Bar as five blocks.[13]

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[12] Appellants did urge the judge to take the entire issue from the jury as a matter of law.

[13] Despite the statement in Appellant Pacelli's Brief, p. 67, that "a search of the transcript reveals that *no testimony was presented from which the jurors might infer the distance between these two addresses*" (emphasis in original), there is at least the following in the record: Hedges testified that the address of the Amvets Club was 122 Second Avenue. Joint Appendix ("JA"), pp. 84a, 90a,

(*Footnote continued on following page*)

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The other appellants apparently argue that as a matter of law 207 and 122 Second Avenue could not be in the same "vicinity" and therefore the issue should not have been submitted to the jury. This position is incorrect. Moreover, any error committed by the trial judge did not harm defendants. The sequence of events shows that there was here nothing more than an immaterial variance between the indictment and the proof—the indictment charging 122 Second Avenue and the proof showing 207 Second Avenue—and appellants were aware of the variance over six weeks before the trial began. See *United States* v. *Ansani*, 240 F. 2d 216, 223 (7th Cir.), cert. denied, 353 U. S. 936 (1957) (variance between Chicago and Cicero, Illinois, held immaterial); *Strauss* v. *United States*, 311 F. 2d 926, 932 (5th Cir.), cert. denied, 373 U. S. 910 (1963); *United States* v. *Glaze*, 313 F. 2d 757 (2d Cir. 1963). Therefore, the judge could have instructed the jury that the proof of act 10 did not specifically conform to the charge in the indict-

(*Footnote continued from preceding page*)

94a, 156a. He also testified that Lulu's Bar was at 13 Street and Second Avenue. *Id.* at 157a. Godwin testified that the bar was on 12 Street and Second Avenue. *Id.* at 220a. Sol Gold testified that he lived "at Second Avenue and 4th Street, 65." Record, p. 3600. Aspelund testified that the Phoenix Bar was on Second Avenue, between 12 and 14 Streets, JA, p. 197a, and on cross-examination stated it was between 10 and 12 Streets. Record, p. 1812. When asked "you gave the address [of the Phoenix Bar] 180 Second Avenue," Aspelund replied "I got it in France" (although he later professed not to have paid attention to the address at the time in question). *Id.* at 1812-18.

Knowing that 65 Second Avenue was at 4 Street and that 180 Second Avenue was between 10 and 14 Streets, the jury could reason that, in the area of Second Avenue in question, there were about 10 or 20 house numbers per block. This would locate the Amvets Club between about 6 and 12 Streets, or up to seven blocks from Lulu's Bar. Depending on what testimony as to various addresses was believed, the jury could easily have placed the distance between the club and the bar at "five blocks (approximately)," which is what it did.

ment but that the variance was immaterial. He could have gone on to say that if the jury believed that the conversation about the counterfeit bill took place at 207 Second Avenue in March or April of 1960, the prosecution had fulfilled its burden as to act 10.[14] Therefore, the judge created an additional issue of fact in his instruction that the jury consider whether 122 and 207 Second Avenue were in the same vicinity, and any error was not only harmless, but was beneficial to appellants. Pacelli also argues that the jury should have been instructed that different non-adjacent addresses are not in the "vicinity" of each other. "Vicinity" has been defined as "a surrounding area or district." Webster's Third New International Dictionary 2550 (1961). No one seriously contends that the jury had an erroneous idea of the approximate distances involved. Its note asserted that the distance was "five blocks (approximately)" and even appellant Pacelli's brief says no more than it is "closer to six blocks apart and on opposite sides of the street."

Appellants have three further major thrusts based on overt act 10: (1) the absence of any Grand Jury testimony about the counterfeit bill conversation was fatal error; (2) the conversation, in any event, was not an act in furtherance of the conspiracy; and (3) reception of the evidence violated the "other crimes" rule.

The first point is based on the premise that the failure of the Grand Jury to consider what developed at the trial as act 10 precludes consideration of the act by the petit jury. In *United States* v. *Negro*, 164 F. 2d 168 (2d Cir. 1947), appellants were convicted for a narcotics conspiracy. There was no evidence of the only overt act alleged in the indictment, but the government argued that

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[14] Subject, of course, to the requirement that the act be in furtherance of the conspiracy, discussed *infra*.

another overt act had been proved. This court reversed for lack of evidence of the overt act alleged in the indictment because the trial judge had instructed the jury only as to this act and had not instructed the jury as to the proven (but unalleged) act. To avoid a problem at the impending retrial, the court considered the question of proving unalleged acts (*id.* at 173):

> We believe that, at least for some purposes, the overt act is not part of the crime. . . . Thus if, in the instant case, there had been no proof of any overt act other than that alleged, and if the defendant Bruchon had been acquitted, we think that, under the doctrine of double jeopardy, he could not subsequently have been convicted for a conspiracy on the same facts with the single exception that, in the second trial, a different overt act was alleged and proved. We think, also, that an overt act is not part of the crime in the sense that the act alleged must be proved, where another unalleged overt act is proved. . . .
>
> Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, such a variance justifies a request for continuance because of surprise.

Appellant Pacelli asks this court to disavow this dictum. Contrariwise, appellants Armone, Grammauta and Viscardi argue that the *Negro* case requires reversal here. The latter contention is clearly erroneous since, under *Negro,* a conviction may rest on an overt act not charged in the indictment. As to Pacelli's frontal attack on *Negro,* the rule of that case has also been accepted by three other courts of appeals, *Napolitano* v. *United States,* 340 F. 2d 313, 314 (1st Cir. 1965); *Culp* v. *United States,* 131 F. 2d 93, 100 (8th Cir. 1942); *Worthington* v. *United States,* 1 F. 2d 154, 155 (7th Cir.), cert. denied, 266 U. S. 626

(1924), although there is authority to the contrary, *Fredericks* v. *United States*, 292 Fed. 856 (9th Cir. 1923), and we see no reason not to adhere to the rule in this circuit.[15] Moreover, the essence of the charge against appellants is a criminal agreement. A principal reason for the overt act requirement in a conspiracy prosecution "is simply to manifest 'that the conspiracy is at work,' *Carlson* v. *United States*, 187 F. 2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates* v. *United States*, 354 U. S. 298, 334 (1957).[16] Where, as here, the unalleged overt act dealing with the counterfeit bill was inadvertently substituted for the alleged overt act dealing with conversation about commissions, defense counsel joined in focussing the jury's attention on testimony as to the former, no objection was made to the trial judge raising this issue, a fortiori no continuance was sought, and there was ample testimony as to the overt act referred to by the trial judge, reversal for the reasons urged by appellants is unwarranted.

As to the second contention, an overt act is an act "committed in pursuance of the agreement." *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants seem to argue that conversation cannot be an "act," and that, in any event, this conversation was not in furtherance of the conspiracy. However, much talk is "action" with direct legal consequences; *e.g.*, people "decide," "promise," and "reject." *Cf.* decisions holding telephone conversations to be overt

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[15] For favorable law review comment on the rule, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 992-93 (1959).

[16] See Developments, *supra* note 15, at 945-49 (other rationales for overt act requirement).

acts, *Singer* v. *United States*, 208 F. 2d 477, 480 (6th Cir. 1953); *Bartoli* v. *United States*, 192 F. 2d 130, 132 (4th Cir. 1951); *Smith* v. *United States*, 92 F. 2d 460, 461 (9th Cir. 1937). Here we have a warning to co-conspirator Hedges by defendant Armone, after the conspirators had gone to the trouble of tracing the source of the counterfeit bill. We hold that this conversation qualified as an "act." Moreover, the jury could find that Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators. The trial court left the issue of furtherance to the jury. We cannot say as a matter of law that the jury could not reasonably have concluded that this conversation, viewed in the context of the other evidence, was in furtherance of the conspiracy. Reliance on *Grunewald* v. *United States*, 353 U. S. 391 (1957), is misplaced, for there the Court stated (*id.* at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the present case, the objectives of the conspiracy—importation and distribution of narcotics—had not been completed at the time of the conversation. And we cannot say that the successful accomplishment of the crime did not necessitate concealment. Cf. *Mount* v. *United States*, 333 F. 2d 39, 44 (5th Cir.), cert. denied, 379 U. S. 900 (1964); *Atkins* v. *United States*, 307 F. 2d 937, 940 (9th Cir. 1962).

Finally, Armone and Grammauta argue that the reception of evidence pertaining to the counterfeit bill, and evidence relating to what may have been a different counterfeit bill (won in a dice game by Armone's nephew and given to Armone's sister-in-law), violated the rule excluding proof of other crimes. But Armone himself was not shown to have passed or received counterfeit money knowingly and voluntarily; moreover, his relatives were not shown to have been knowingly connected with the counterfeit money either. This argument is without merit.

H. Armone and Grammauta

Hedges's testimony

Defendants Joseph Armone and Stephen Grammauta raise nine separate grounds, in addition to those already discussed, for reversing the jury verdict. Four of them have to do, in whole or in part, with the testimony of Charles Hedges, the chief witness for the prosecution. Thus, these appellants attack the adequacy of the trial court's instruction under *United States* v. *De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), which held that in certain circumstances prior sworn testimony of a witness could be admitted as substantive evidence, rather than for impeachment only. Hedges had previously been prosecuted in Connecticut, see *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963), and had given testimony contrary to his testimony in this trial. The court below charged that the jury could consider the prior testimony in weighing credibility, and could also consider it as affirmative evidence in this trial. An objection below to the instruction (apparently not made by these two appellants) related to the possibility that both the earlier and current testimony could be false. The trial court thereupon

charged:

> Secondly, you remember I talked about Hedges' testimony at the Connecticut trial and I told you it is for you to judge on which occasion he was telling the truth. But, of course, it is equally within your province to find he was testifying falsely on both occasions. You can do that. You can find that or you can determine on which occasion he was telling the truth and in which part of his testimony he was telling the truth.

These instructions were clear and correct.

Armone and Grammauta next claim that cross-examination of Hedges was unduly limited. We have examined the specific instances cited and find no abuse of discretion in the limitation of this five and one-half day cross-examination. These appellants next contend that the federal rule allowing conviction on uncorroborated testimony of accomplices is not one of unvarying application, that it is the "better practice" to require corroboration and that the circumstances of this case call for the better practice. But a short time ago, this court stated:

> We cannot understand why they insist that the testimony of accomplices must be corroborated. The federal rule is clearly to the contrary. [Citations.]

United States v. *Kelly*, 349 F. 2d 720, 767 (2d Cir. 1965). Appellants also suggest we hold the accomplice testimony in this case incredible as a matter of law. The argument is completely without merit. *United States* v. *Aviles*, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U. S. 974, 982 (1960).

Denial of continuance to Armone

Appellant Armone next contends that the court erroneously denied his motions for severance on account of ill-

ness during the trial. Armone had been shot in the chest some sixteen months before the trial started, but, according to his brief, still suffered at trial from a "pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition." Trial commenced on May 3, 1965, and the first mention thereafter of Armone's condition to the court was on May 19, when the trial judge, after being informed of a jury tampering incident, remanded all defendants. Thereafter, the judge allowed Armone to be treated by his personal physician on two occasions. On Tuesday, June 8, the trial was adjourned so that Armone could be taken to the hospital where he was examined by a government physician. The following day counsel moved for a severance, but a few hours of trial were held in the afternoon. The court stated that it would observe defendant. On June 10, the court was informed that Armone was being detained in the hospital, and two adjournments followed until Monday, June 14. That day and the next, counsel again objected to proceeding with trial, but the trial continued. Both sides rested on Tuesday, June 15, and after another day's adjournment final arguments started on Thursday, June 17. On the afternoon of June 15, the court took testimony from Armone and two physicians on the issue of competence to stand trial; the court also heard defendant again and another doctor on June 17, and a fourth doctor on July 9, the latter date falling after conclusion of the trial.[17]

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[17] Since the judge had denied the motions before the trial ended, we have considered the record as it was before him then. It should be noted, however, that not infrequently competence to stand trial is determined after the fact or *nunc pro tunc*. E.g., *United States* v. *Tom*, 340 F. 2d 127 (2d Cir 1965) (*per curiam*); *Johnston* v. *United States*, 292 F. 2d 51 (10th Cir.), cert. denied, 368 U. S. 906 (1961); *Wells* v. *United States*, 239 F. 2d 931 (D. C. Cir. 1956) (*per curiam*); see 18 U.S.C. § 4245.

Appendix B.

The determination of competence to stand trial is, of course, basically a question of fact and, as with appellate review of most factual issues, the higher court bows to the lower court unless an abuse of discretion is manifest. *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965); *United States* v. *Shotwell Mfg. Co.*, 287 F. 2d 667, 672 (7th Cir. 1961), aff'd on other grounds, 371 U. S. 341 (1963); *Stein* v. *United States*, 263 F. 2d 579, 581-82 (9th Cir. 1959); *United States* v. *Alker*, 260 F. 2d 135, 157 (3rd Cir. 1958), cert. denied, 359 U. S. 906 (1959). Here at most there was a conflict of testimony, which the trial judge was in the better position to resolve. Despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence to stand trial during the period under attack. In the light of this evidence and the trial judge's grant of adjournments, we cannot say that he was clearly in error and abused his discretion.

Alleged other crimes testimony and guilt by association

Appellants Armone and Grammauta also claim that they were denied a fair trial by proof of other crimes or a propensity to commit them. Beside the counterfeit bill incidents, dealt with *supra*, they point to two answers given by Hedges on cross-examination. In one, responding to a question about an offer of a job, Hedges said that Joseph Cahill (a severed defendant) proposed that Hedges rob a bookmaker for "some defendants." The judge promptly instructed the jury to disregard this answer. The other answer came about as follows:

> Q. Did you testify at the Connecticut trial that you went down and brought Mr. Aspelund into the hotel?
> A. If I did your defendants would be up there—

After immediate objection the question was rephrased and a different answer given. We think that these two brief,

isolated outbursts, at most ambiguous, unavoidable when dealing with witnesses of Hedges's admitted background, coming out on cross-examination by the defense, and with no prosecutorial intent to improperly prejudice defendants, were patently harmless when considered in conjunction with the curative steps taken.

In the same vein, appellants also claim that admission into evidence of a nightclub photograph showing some defendants seated together and a telephone number book containing the names of several defendants was reversible error because they improperly created an impression of guilt by association. However, the prosecutor's summation included the following:

> The government is not trying to prove guilt by association, but isn't it some evidence of the conspiracy, that these people knew each other and that these people went out with each other?
>
> • • • • •
>
> Once again, ladies and gentlemen, I am not talking about guilt by association, I am just talking about these people knowing each other and associating with other as some evidence.

At this point, the court told the jury "you can't find guilt by association" and that it had to "consider all the evidence as to the association." Thereafter, in his charge, the judge also said:

> Now, of course, you should not infer membership in a conspiracy merely because of family relationship, merely because some of the defendants may have had their pictures taken together, merely because of friendship between alleged co-conspirators. Of course, you can't find any defendant guilty merely by association.

Since agreement is an element of conspiracy, evidence of association is relevant. The judge properly charged the jury on how to handle the issue.

Since the photograph and telephone-and-address book had been seized incident to or after the arrest of co-defendant Cahill, appellants also claim that they were admissions of a co-conspirator made after his arrest and hence were inadmissible against them. But the evidence involved here was not offered under the admission exception to the hearsay rule to assert the truth of matter contained in an out-of-court statement. A photograph is not an out-of-court statement at all; both items of evidence, moreover, were in existence before the end of the conspiracy. A similar objection to the admission of ten to twelve kilos of heroin is also without merit.

Single or multiple conspiracies

Armone and Grammauta next contend that the evidence showed multiple conspiracies and thus prejudicially varied from the single conspiracy charged in the indictment; implicit in this argument is an alleged insufficiency of evidence linking them to a single conspiracy. They also assert that, in any event, the instructions were not adequate and the verdict was mistaken on this point. Arguing variance, appellants rely essentially on facts disclosed in *United States* v. *Cianchetti, supra,* in which Hedges was a defendant and, it is claimed, the present defendants were not mentioned at trial. But in trial 1 there can be a conspiracy with several defendants, and in trial 2 there can be a different conspiracy with some of the same defendants or co-conspirators, or even the same conspiracy with other, different defendants being tried for the first time, all without fatal multiplicity in any case. The judge's charge adequately distinguished between a single conspiracy and multiple conspiracies. As to any supposed insufficiency of

evidence, the spare summary of the record *supra* (pp. 2537-2539) shows clear support for the jury's verdict. In any event, there is no indication that any variance rose to sufficient dimensions to be prejudicial. *United States* v. *Agueci,* 310 F. 2d 817, 827 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants claim that the court should have guided the jury by marshalling the facts, and should have told the jurors that Armone had to be connected with activities prior to entry of new sources of supply of narcotics, or those activities must be disregarded in determining his guilt. No exception was taken by counsel to the charge on these two grounds, and we do not find "plain error" under Fred R. Crim. P. 52(b). *Compare United States* v. *Kahaner,* 317 F. 2d 459, 479-80 n. 12 (2d Cir.), cert. denied, 375 U. S. 835, 836 (1963), *with United States* v. *Kelly,* 349 F. 2d 720, 757 (2d Cir. 1965).

Missing witness instruction

Finally, these appellants assign as error the court's missing witness instruction concerning one Andy Dillon. The court said:

> You recall that Godwin testified that he received a counterfeit $100 bill and said that it came from one Andy Dillon. Said Andy Dillon was not called to testify by either the government or the defendants, although I am informed that he was in the courtroom during the course of the trial.
>
> Mr. Dillon could have been called by either side as a witness so that from the failure of either side to call him, you may infer that his testimony might have been unfavorable to either the government or to the defendants. But it is equally within your discretion to draw no inference at all from the failure of the government or of the defendants to call Dillon as a witness.

Appellants point out that Dillon was associated by the evidence with Armone, that the government refused to stipulate and the court refused to allow counsel to tell the jury that Dillon had been subpoenaed by the government, and that the instruction included mention of the fact that Dillon was sitting in the courtroom during the trial (a fact brought to the court's attenion by defense counsel). Counsel, after the charge, requested that the jury be told the government had subpoenaed Dillon and that it should disregard any portion of the charge insofar as it allowed the drawing of an inference against defendants.

The instruction given by Judge Bonsal was a correct statement of the law, and may be given in the absence of a request. *United States* v. *Llamas,* 280 F. 2d 392, 393 (2d Cir. 1960). The reference to Dillon's presence, while unnecessary, could not be prejudicial, since it merely indicated the foundation for the instruction. If the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented. In any event, no argument is made that Dillon was not in the courtroom. That the government may have been responsible for Dillon's presence is irrelevant. Appellants are in reality attacking the essence of the missing witness charge, *i.e.,* that the jury can draw an unfavorable inference from failure to put a witness on the stand; a defendant does not have the privilege of keeping the missing witness charge from the jury. Even if the government had not subpoenaed Dillon, the charge could have been given present some showing that he was available, if the other conditions for the charge were fulfilled. Hence, that the government subpoenaed Dillon is irrelevant. Since Dillon was undisputably available for each side, the charge was not erroneous. *United States* v. *Comulada,* 340 F. 2d 449, 452 (2d Cir.), cert. denied, 380 U. S. 978 (1965); *United States* v. *D'Angiolillo,* 340 F. 2d 453, 457 n. 5 (2d

Cir.), cert. denied, 380 U. S. 955 (1965); cf. *United States* v. *Bergman*, 354 F. 2d 931, 935 (2d Cir. 1966) (witness equally unavailable to both; no inference should be drawn).

III. Viscardi

Statute of limitations

In addition to joining in contentions already discussed, appellant Viscardi raises two arguments applicable only to him. First, he attacks the court's charge on the statute of limitations. He argues that the evidence showed that before September 30, 1959 (the earliest date not barred by the statute), he took narcotics from Hedges, and after that time he delivered them to Hedges, and, therefore, the court should have instructed the jury to find "exactly which conspiratorial agreement he had entered into, and that such agreement continued past September 30, 1959." The short answer is that a shift in role, as appellant terms it, would not affect the statute of limitations. The conspiracy's vital elements (members and purposes) remained the same after September 1959, and we cannot say that a different job—at least one with as little difference as that involved here—would entail a different conspiracy vis-a-vis the conspirator involved. *United States* v. *Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), cert. denied, 379 U. S. 960 (1965), is not in point; that case dealt with the shifting objectives of the conspiracy. Viscardi was not tried for making a delivery to or receiving narcotics from Hedges; the charge was conspiring to effectuate much more generalized objectives, and whether he was a deliverer or recipient on any particular occasion would not be determinative of what he had conspired to achieve. It is, therefore, unnecessary to deal with the government's contention that Viscardi's function as "plant man" never did change.

Appendix B.

Multiple representation

Vicardi also claims that he was prejudiced by sharing counsel with the two Armones and Grammauta and that the trial court's failure to apprise him of "the hazards inherent in sharing an attorney with the Armones and Grammauta" was error. The short answer to Viscardi's contention is that almost six months prior to trial, the government requested the court to inquire into the existence of a possible conflict of interest. The following interchange between government counsel and counsel for Viscardi, the two Armones, and Grammauta appears on the record:

> Mr. Jacobs: . . . [Y]our Honor, this case was on on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.
>
> The Court: I assume he doesn't or he would have brought it to the attention of the Court.
>
> Mr. Lewis: That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

Viscardi relies upon *Glasser* v. *United States,* 315 U. S. 60 (1942), and *Campbell* v. *United States,* 352 F. 2d 359 (D. C. Cir. 1965). Nothing in *Glasser* requires the government or the court to take further steps after receiving such an assurance from an officer of the court. In *Campbell,* where a single attorney was retained by two defendants, the court reversed the convictions because the trial

judge did not inquire into whether the defendants knowingly accepted the risk of sharing defense counsel. We need not now decide how much of the *Campbell* case we accept as law in this circuit. We simply hold that the trial judge's inquiry of counsel as to possible conflict of interest in this case sufficed to protect any right Viscardi may have had in the matter. The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances. Viscardi argues that his counsel might have devoted more time to him in final argument. Viscardi also points out that he had no previous criminal record, that he was the only defendant to produce a character witness, and that the trial judge received many letters in his behalf recommending leniency in sentence. He contends that his counsel might have suggested that additional character witnesses should testify during the trial, had it not been for the fact that this would have reflected adversely upon Armone and Grammauta, who presented no character witnesses. However, these are not weighty arguments. We can take judicial notice of the fact that many who would touch pen to paper will not stand up to be counted in person under oath and in court. Also, brushing off a co-defendant in summation can be effective strategy.[18] Cf. *United States* v. *Burkeen*, 355 F. 2d 241 (6th Cir. 1966).

We have considered all contentions made by appellants. Having found no reversible error, we affirm the convictions.

Judgments affirmed.

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[18] It should be noted that defendant Alfred Armone, who was represented by the same counsel and received approximately as much attention in counsel's closing remarks as defendant Viscardi, was acquitted.